



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

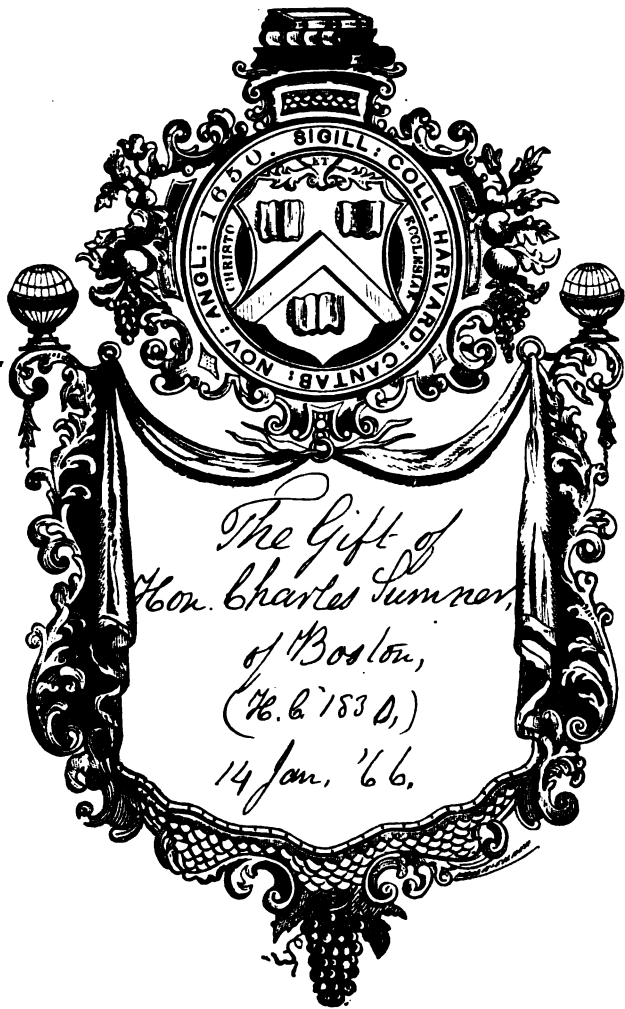
### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

24 1/2 5

Int 4950.2

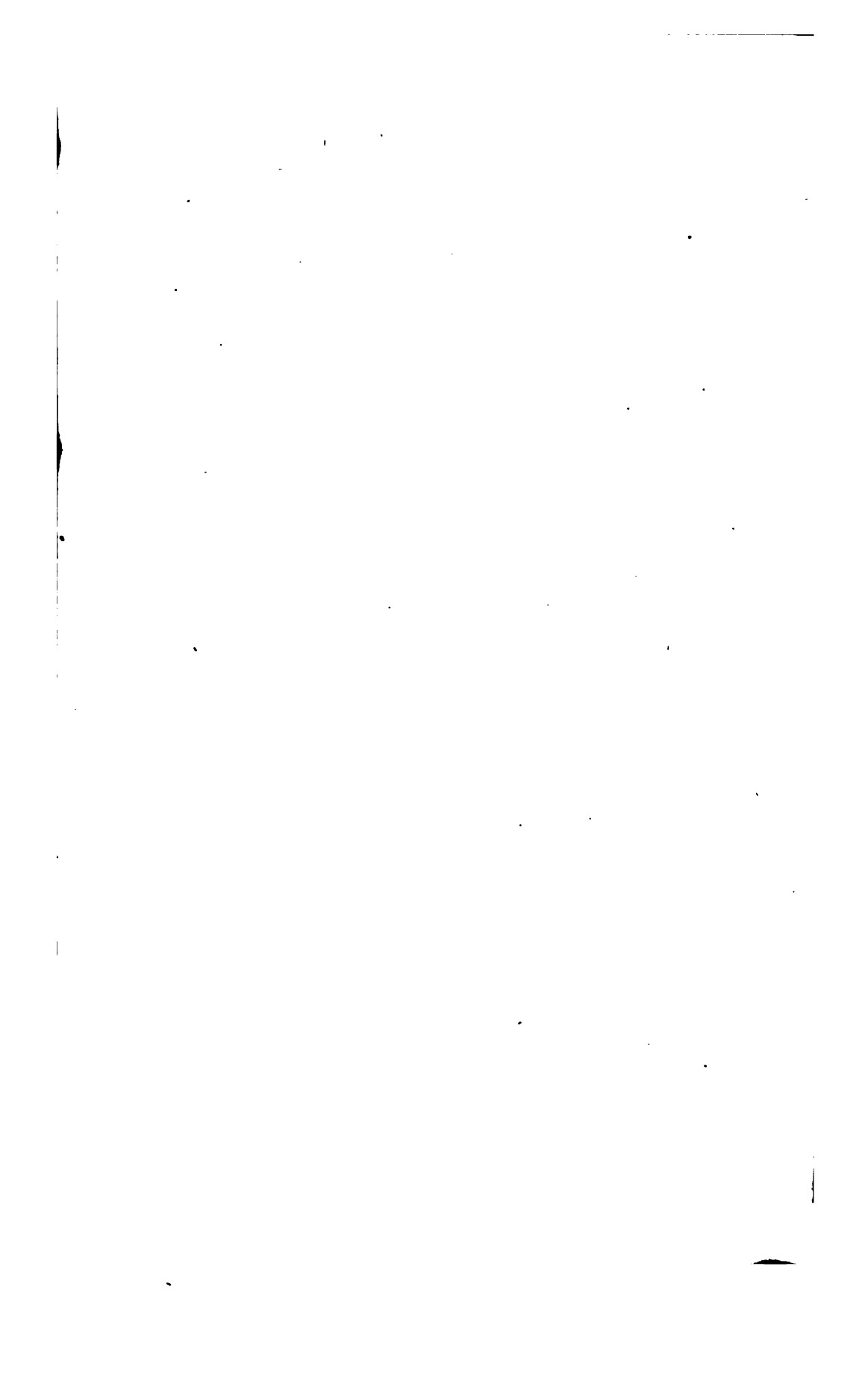
Box June, 1867,













*Just the H.B. & Co. Co. Co.*

IN THE COURT OF EXCHEQUER AT WESTMINSTER,  
MICHAELMAS TERM, 27TH VICTORIA.

BEFORE THE RIGHT HON.

THE LORD CHIEF BARON POLLOCK,  
MR. BARON BRAMWELL, MR. BARON CHANNELL,  
AND MR. BARON PIGOTT.

THE ATTORNEY GENERAL - SILEM AND OTHERS,

Charging the Vessel "ALEXANDRA" seized under the Foreign  
Enlistment Act,

(59 George III. Chapter 69.)

REPORT OF THE ARGUMENTS

ON THE APPLICATION OF THE ATTORNEY-GENERAL FOR LEAVE TO MOVE  
FOR A NEW TRIAL AFTER THE FIRST FOUR DAYS OF TERM.

RESULTING IN A

RULE NISI TO SHOW CAUSE WHY A NEW TRIAL SHOULD  
NOT BE HAD.

AND

THE ARGUMENTS THEREON;

TOGETHER WITH

THE JUDGMENT OF THE COURT;

AND ALSO

AN APPENDIX CONTAINING VARIOUS DOCUMENTS  
REFERRED TO.



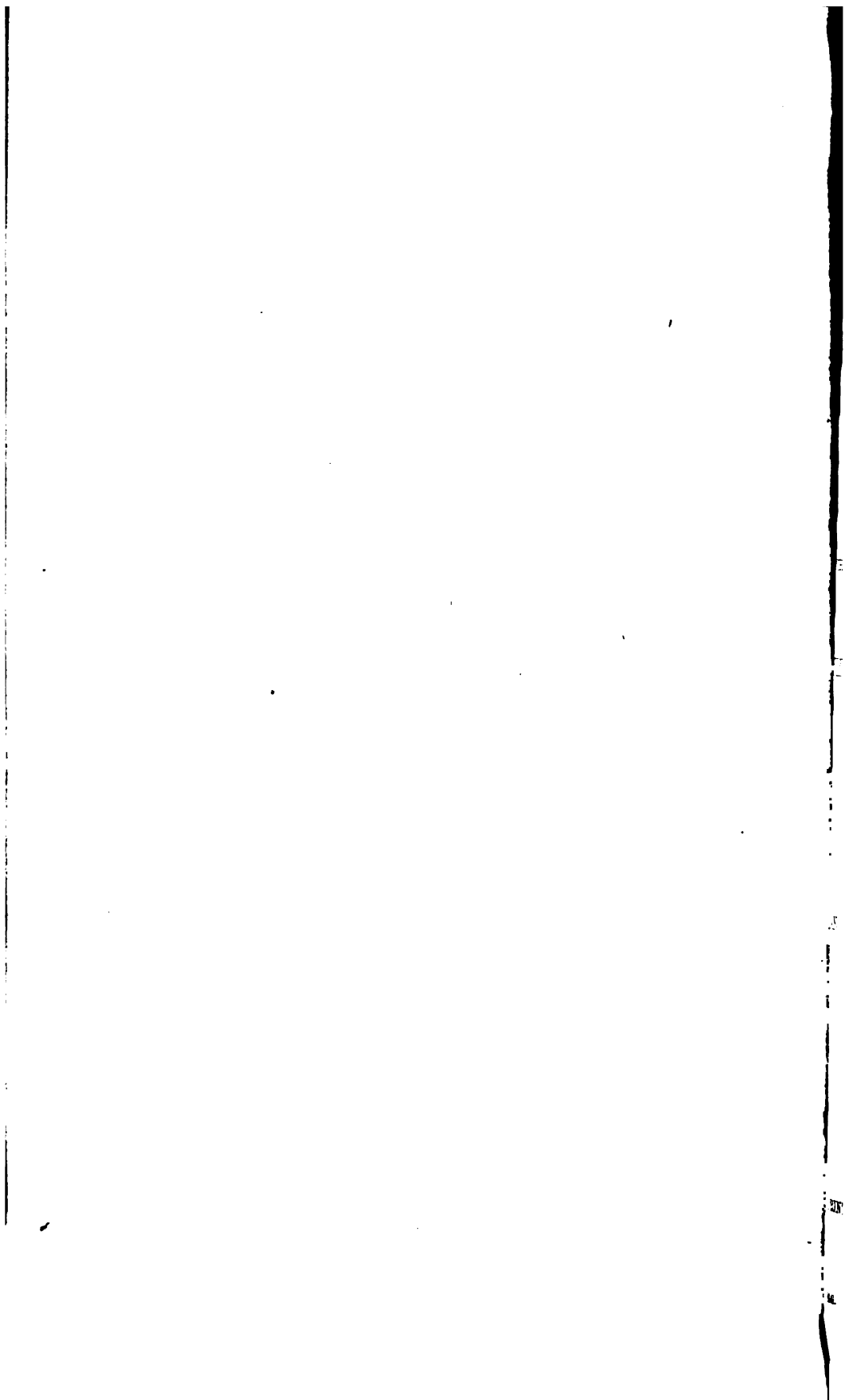
LONDON:

PRINTED BY GEORGE E. BYRN AND WILLIAM SPOTISWOODE,  
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY,  
FOR HER MAJESTY'S STATIONERY OFFICE.

[1861]



24 1/2.5





IN THE COURT OF EXCHEQUER AT WESTMINSTER,  
MICHAELMAS TERM, 27TH VICTORIA.

BEFORE THE RIGHT HON.  
THE LORD CHIEF BARON POLLOCK,  
MR. BARON BRAMWELL, MR. BARON CHANNELL,  
AND MR. BARON PIGOTT.

THE ATTORNEY GENERAL v. SILLEM AND OTHERS,  
Claiming the Vessel "ALEXANDRA," seized under the Foreign  
Enlistment Act,  
(59 George III. Chapter 69.)

## REPORT OF THE ARGUMENTS

ON THE APPLICATION OF THE ATTORNEY-GENERAL FOR LEAVE TO MOVE  
FOR A NEW TRIAL AFTER THE FIRST FOUR DAYS OF TERM,

RESULTING IN A

RULE NISI TO SHOW CAUSE WHY A NEW TRIAL SHOULD  
NOT BE HAD,

AND

THE ARGUMENTS THEREON;

TOGETHER WITH

THE JUDGMENT OF THE COURT;

AND ALSO

AN APPENDIX CONTAINING VARIOUS DOCUMENTS  
REFERRED TO.



LONDON:

PRINTED BY GEORGE E. EYRE AND WILLIAM SPOTTISWOODE,  
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY,  
FOR HER MAJESTY'S STATIONERY OFFICE.

1864.

Int 4950.2

~~24~~<sup>1</sup>/<sub>2</sub> 5

1866, Jan. 14.

Gift of  
Hon. Charles Sumner,  
of Boston.

*Counsel for the Crown.*

The Attorney General—Sir ROUNDELL PALMER, Knight.

The Solicitor General—Sir ROBERT PORRETT COLLIER, Knight.

The Queen's Advocate—Sir ROB. JOSH. PHILLIMORE, Knight,  
Q.C., D.C.L.

Mr. LOCKE, Q.C., M.P.

Mr. T. JONES.

---

*Counsel for the Claimants.*

Sir HUGH MCCALMONT CAIRNS, Knight, Q.C.

Mr. KARSLAKE, Q.C.

Mr. MELLISH, Q.C.

Mr. KEMPLAY.

---

*Solicitor for the Crown.*

Mr. F. J. HAMEL, Solicitor for Her Majesty's Customs.

---

*Solicitors for the Claimants.*

Mr. E. L. ROWCLIFFE, (GREGORY, ROWCLIFFE and Co.,) London.

Agents for

Messrs. FLETCHER and HULL, Liverpool.

# CONTENTS.

---

<b>TUESDAY, 3D NOVEMBER 1863.</b>		Page
Argument on Application for leave to move for New Trial after the Expiration of the First Four Days of Term	-	5
 <b>WEDNESDAY, 4TH NOVEMBER 1863.</b>		
Motion to apply the Common Law Procedure Acts 1852 and 1854, and the Rules of Pleading and Practice to the Revenue side of the Court	- - - - -	12
Copy Rule of Court	- - - - -	15
 <b>THURSDAY, 5TH NOVEMBER 1863.</b>		
Motion for Rule to show Cause why there should not be a New Trial	- - - - -	18
Copy Rule Nisi	- - - - -	62
 <b>TUESDAY, 10TH NOVEMBER 1863.</b>		
Application to the Court to fix a Day to move to make Rule for New Trial herein absolute	- - - - -	64
 <b>TUESDAY, 17TH NOVEMBER 1863, 1st Day.</b>		
Argument for Motion to make the Rule for New Trial absolute	-	67
 <b>WEDNESDAY, 18TH NOVEMBER 1863, 2d Day.</b>		
Argument continued	- - - - -	145
 <b>THURSDAY, 19TH NOVEMBER 1863, 3d Day.</b>		
Argument continued	- - - - -	237
 <b>FRIDAY, 20TH NOVEMBER 1863, 4th Day.</b>		
Argument continued	- - - - -	321
 <b>SATURDAY, 21ST NOVEMBER 1863, 5th Day.</b>		
Argument continued "	- - - - -	413
 <b>MONDAY, 23D NOVEMBER 1863, 6th Day.</b>		
Argument concluded	- - - - -	472
 <b>MONDAY, 11TH JANUARY 1864.</b>		
Judgment on Motion to make Rule Nisi for New Trial absolute	-	525
 <b>APPENDIX.</b>		
Letter from Earl Russell to the Lords of the Treasury, dated 31st January 1862	- - - - -	i
Decree pronounced on 2d August 1862 by the Judge of the Vice Admiralty Court of the Bahamas in the Case of the Queen v. The British Steamship "Oreto"	- - - - -	iv

N.B.—*To render intelligible the frequent reference made by Counsel to the reports of the trial, it may be observed that two copies have been printed, the one for the Crown containing an appendix and termed by Counsel the LARGER copy, and the other for the claimants termed by Counsel the SMALLER copy. There is no substantial difference between the two reports, the variances consisting chiefly of clerical inaccuracies for the most part rectified in the larger book.*

IN THE COURT OF EXCHEQUER AT WESTMINSTER,  
MICHAELMAS TERM, 27TH VICTORIA.

---

BEFORE THE RIGHT HON.  
THE LORD CHIEF BARON POLLOCK,  
MR. BARON BRAMWELL, MR. BARON CHANNELL,  
AND MR. BARON PIGOTT.

---

THE ATTORNEY GENERAL *v.* SILLEM AND OTHERS  
Claiming the Vessel "ALEXANDRA."

---

ARGUMENT ON APPLICATION FOR LEAVE TO MOVE  
FOR NEW TRIAL AFTER THE EXPIRATION OF  
THE FIRST FOUR DAYS OF TERM.

---

Tuesday, 3rd November 1863.

*Lord Chief Baron.*—Mr. Attorney General, the ordinary practice of the Court is to take the peremptory paper the first thing on the second day of Term, but I presume that you are in attendance on the business of Her Majesty, and you are therefore entitled to pre-audience. If you have anything to move, the Court will hear you.

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

---

*Mr. Attorney General.*—I thank your Lordship. My Lord, I have come here to apply to your Lordships not at present to go into any motion which will involve any lengthened argument or discussion, but I come to ask your Lordships to give me a longer than the ordinary time of four days for the purpose of making, if it should become eventually necessary, a motion for a new trial in the case of the Attorney General *v.* Sillem, which was tried before the Summer Assizes before the Lord Chief Baron concerning the forfeiture of the ship "Alexandra." It will be in his Lordship's recollection, and indeed it is known to everybody, that upon that occasion his Lordship laid down the views which he thought ought to govern the jury as for the construction of the Act of Parliament commonly called the Foreign Enlistment Act. His Lordship did so in a manner which we thought was perfectly clear and intelligible to all persons who heard it. There was no difference whatever in the understanding of his Lordship's ruling on the part of the counsel for the Crown, and we have no reason to suppose that it was viewed otherwise by the counsel for the claimants, or generally understood in any other sense than that in which we viewed it. At the end of the trial, and before the verdict, we proposed in the usual manner and complying with form to offer exceptions to that ruling. We were told, however, that it was not at all necessary to stand upon form. His Lordship said, "I will accept any bill of exceptions you wish to tender."

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

And accordingly after the verdict, but not before, a note hastily written down at the time of the points or the principal points which we understood to be laid down was handed in, and then it was said by his Lordship that we were not to be bound by what passed on that occasion; that time might be taken and that the thing would be settled. My Lords, of course we were in hopes that there would be no difficulty at all in settling a bill of exceptions. It is a point of very great importance, and most fit to be raised solemnly by exceptions so that it may go to the Court of Error, and if it should be necessary to the last Court of Appeal. We are most anxious that it should be so raised and so determined, and we have no reason to doubt that the other side are equally so. But hitherto there have been difficulties in arriving at any form of exceptions, which we can rely upon as certain to receive the signature of his Lordship. We hope that those difficulties will be overcome. We are in communication at the present time with the counsel on the other side, who have in their possession the form of exceptions which we now propose to endeavour to tender, and we trust that an agreement may be arrived at between ourselves and the opposite counsel, or if that should not happen that his Lordship upon being applied to at Chambers in the usual way will be able to settle such a form of bill of exceptions as will raise the real question to be determined in a manner which will be satisfactory to both parties and useful to the public, and we infinitely prefer—

*Lord Chief Baron.*—Mr. Attorney General, I think it right to state that I myself see no prospect whatever of any change in the view which I have taken as to what is my duty in signing the bill of exceptions. The correspondence between me and the late learned Attorney General probably you may have seen.

*Mr. Attorney General.*—Yes, my Lord.

*Lord Chief Baron.*—But you were not present at the whole of the trial, and, so far from my laying down the law, as the bill of exceptions tendered to me assumes, I took particular pains to avoid doing anything of the kind. I had originally, during the course of Sir Hugh Cairns' argument, undoubtedly entertained an impression (I call it no more) that all the expressions of "equipping, arming, fitting," and so on, probably meant the same thing, and were to be referred to the verbiage of an Act of Parliament, as you commonly find a thing called "ship or vessel," the statute no doubt in that case meaning precisely the same thing by the one and the other. But in the course of his address to the jury, the late Attorney General mentioned a case the name of which I do not recollect. I think it is in 5th Curtis, or the 5th volume of some Reports. I could refer to it, but it is not desirable now to take up the time by doing so, and that was a decision in an American Court, with an appeal to the Supreme Court, where the decision below was affirmed, and it was a case where the vessel was completely prepared in every other respect, but that she was not armed. When I came to sum up I mentioned that case to the jury, commended it so far as to say that

I adopted it, and left it to them, and pointed out that what formerly apparently might have been inferred from what had dropped from me in the course of the address of counsel was not what I told them was the law; and I finally left the question to them in the alternative, using the very words of the Act of Parliament, "If you think that this vessel was armed or equipped or fitted out, or was intended to be armed or fitted out or equipped, then your verdict must be for the Crown; if not, for the defendant." Now, the Attorney General presented to me a bill of exceptions, by which I purported to tell the jury that the vessel must be armed, and that if it was not armed there was no offence. I not only did not so tell the jury, but if you read the short-hand writer's notes which were furnished to me, I think no person can have any doubt but that I left the question as I am now stating. But, Mr. Attorney General, probably all the object which you have in view may be obtained by your moving without reference to the bill of exceptions at all. It is true that there was no point reserved at the trial, so as to give you a right of appeal in the event of the rest of this Court concurring with me in the direction which I gave to the jury. But this is a matter of so much importance that I do not know whether I can pledge the Court, but certainly it would be, I think, very much to be regretted, however unanimous this Court might be, if we did not give you, which we have the power of doing, a right of appeal to the Superior Court.

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

*Mr. Attorney General.*—I understand that your Lordships have no power by the Act of Parliament, unless there be a difference of opinion. I understand that you have no power at all.

*Lord Chief Baron.*—Mr. Attorney General, that is not so.

*Mr. Attorney General.*—No, my Lord, I misunderstood what my learned friend Mr. Jones said to me.

*Lord Chief Baron.*—We have the power of granting you an appeal, and I must say, as far as I am concerned, that however unanimous the Court may be, and however strong the opinion, if you wish to have an appeal, certainly my voice would be in favour of giving you that. It would not then be a privilege, it would be an indulgence.

*Mr. Attorney General.*—I am much obliged to your Lordship.

*Lord Chief Baron.*—The questions concerned are so important that I think we ought to do so; but I do not know whether the other members of the Court take the same view.

*Mr. Baron Bramwell.*—I understand the difficulty to be this, that the Common Law Procedure Act does not apply to a proceeding of this nature.

*Mr. Attorney General.*—Yes, my Lord.

*Mr. Baron Bramwell.*—This Act of Parliament, which, to a certain extent, assimilated Crown proceedings to civil actions, does not comprehend the case of an appeal from making absolute or discharging a rule.

*Mr. Attorney General.*—That is what we apprehend, my Lord.

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

*Mr. Baron Bramwell.*—Whether that is so or not is open to some doubt.

*Mr. Attorney General.*—My learned friend Mr. Jones has considered that point carefully (I cannot say that I have), and he is very strongly under that apprehension that the Act of Parliament does not reach the case.

*Mr. Baron Bramwell.*—There has been a case argued here, the case of a writ of intrusion by the Crown, and the point has been slightly considered, but not at all argued at the Bar, whether, if there was a difference of opinion upon the Bench, such as would entitle a dissatisfied party in an ordinary civil action to appeal, the words of the Act are large enough to reach such a case.

*Mr. Attorney General.*—Of course it would be extremely important that that point should be very carefully considered before the suggestion, which has been so kindly thrown out, was acted upon. No doubt I fully understand that your Lordships would be quite willing, if you had the power so to exercise it.

*Mr. Baron Channell.*—Yes.

*Mr. Attorney General.*—At the same time, if your Lordships have not the power, of course no amount of goodwill on your part could enable you to do so.

*Mr. Baron Bramwell.*—Mr. Attorney General, what has occurred to me as a difficulty in the course which you suggest is this. You are apprehensive that the Lord Chief Baron may decline to sign a bill of exceptions in the form in which you think he ought to sign it. But then if you come and move for a new trial on the ground that he directed the jury in conformity with your notion of his direction, and he reports to us that he did not so direct, of course we should grant no rule for a new trial on that ground; so that there seems to me to be this sort of difficulty, that, if my Lord will not sign a bill of exceptions in the form in which you require it, on the ground that he did not so direct the jury, neither should we entertain an application for a new trial on that ground.

*Mr. Attorney General.*—I do not know, my Lords, but we have the *litera scripta* here, and I was not aware that even a learned judge was able to interpret his own words upon a question of new trial in a sense different from their plain meaning.

*Mr. Baron Bramwell.*—According to my experience (and important as this case may be I do not think that we ought to deviate from it) the invariable practice is to take the report of the learned judge as to the direction which he gave to the jury.

*Mr. Attorney General.*—I should be bound by the practice, no doubt.

*Lord Chief Baron.*—I have read the short-hand writer's notes.

*Mr. Attorney General.*—So have I, my Lord.

*Lord Chief Baron.*—The inquiry with respect to the direction to the jury is not whether something was said in the course of the trial from which somebody may infer something else, but what was the point left to the jury? Now, this is the summing up. After stating some of the evidence, I think that of a captain in the



Royal Navy, I go on thus: "The question is, was there any intention that in the port of Liverpool, or in any other port, she should be, in the language of the Act of Parliament, either equipped, furnished, fitted out, or armed with the intention of taking part in any contest." Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

*Mr. Attorney General.*—Yes my Lord; but your Lordship had told the jury before what those words meant, and had placed your interpretation upon the Act of Parliament.

*Lord Chief Baron.*—Mr. Attorney General I must entirely deny that; unfortunately you were not here the whole of the time.

*Mr. Attorney General.*—I was here during the whole of the summing-up, my Lord, every word of it.

*Lord Chief Baron.*—That may be. "That there was a knowledge that very likely she would be so applied there can be no doubt, as there is when persons send powder. I take it for granted that there are agents on both sides, one openly buying every munition of war and openly carrying it away, the others buying wherever they can." "If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order, and in compliance with a contract, leaving it to those who bought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not been in any degree broken. I leave you to find your verdict, unless you wish me to read the evidence over to you." They did not wish to hear the evidence, and they found a verdict for the defendants.

*Mr. Attorney General.*—Of course your Lordship is very well aware that that is the conclusion of a long summing-up of which we have a note, and your Lordship said, after we had made the observations which we did subsequently to the verdict, "Mr. Attorney General, I will not bind you to what passes on the present occasion, there cannot be any doubt now. I cannot alter the thing, and I have no doubt that you have a very accurate note of what I have said."

*Lord Chief Baron.*—Yes.

*Mr. Attorney General.*—And immediately before that, my Lord, I said, and your Lordship made no observation to the contrary, "Your Lordship said the words were the same—that every one of the words required a warlike armament at Liverpool—that is the point."

*Lord Chief Baron.*—That, Mr. Attorney General, you will find was distinctly explained in the course of the summing-up. I will read you the passage.

*Mr. Attorney General.*—I have the passage, my Lord, and have read it.

*Lord Chief Baron.*—It was calling the jury's attention to the finding in the case to which I have alluded, and adopting it as the law for the present, though I must say that personally I do not entirely agree with it, and if it had to be re-argued in the Courts of this country it would not be found to be correct.

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

*Mr. Attorney General.*—I will, with your Lordship's permission, refer to the passage which you mention.

*Lord Chief Baron.*—The question now is, what is the course which we can take consistently with the rules of the Court.

*Mr. Attorney General.*—That is so, no doubt. My Lord, we are most anxious, and I believe that the other side are equally anxious, to raise the question by a bill of exceptions.

*Lord Chief Baron.*—I believe that the rule here is this ; if you desire to move for a new trial upon any other matter than a point of law, then you have the power to move, as, for instance, if you wish to move for a new trial on the ground that the jury ought not to have found the verdict which they did find, the Court, I think, would entertain that application ; but if you wish to reserve to yourself the power of moving upon a point of law, having tendered a bill of exceptions upon some other point of law, or the same, then I think that the Court probably would not yield to that application.

*Mr. Attorney General.*—My Lord, I think that that would be quite against the practice of the Court. The application which I wished to make simply was, that my time for moving might be enlarged. I believe that on both sides we are under the same impression, that something was ruled concerning the interpretation of the statute, and that the jury found their verdict under the influence of such a direction.

*Lord Chief Baron.*—I think that nothing of the sort occurred.

*Mr. Attorney General.*—Then we are both of course under a misapprehension ; but being both under that misapprehension, and the point supposed to be ruled being one which is on both sides considered of the utmost importance, I believe that it is the common wish of both sides to raise that point, if it be possible, by bill of exceptions, and we hope to attend your Lordship in the usual course, in order to have such a bill of exceptions settled. If that should be impossible, then of course I shall move, but in the meantime, hoping that it may not be impossible, my application was that my time for moving might be enlarged beyond the first four days, so that if we cannot obtain your Lordship's signature to a bill of exceptions raising the question, then I may move.

*Mr. Baron Bramwell.*—It is a very technical matter. We have held that we have not the power to allow a motion for a new trial to be made after the four days in a civil case by the express words of the Act of Parliament. The way in which that has been what one may call evaded has been by permitting the motion to be made and adjourned. Then there is this difficulty ; that if you move for a new trial, having tendered a bill of exceptions, you must give it up.

*Mr. Attorney General.*—That I am not prepared to do.

*Mr. Baron Bramwell.*—I do not know whether you follow the technical difficulties in your way.

*Mr. Attorney General.*—Perfectly, my Lord.

*Mr. Baron Bramwell.*—I cannot help repeating what I said to you, that supposing you fail in procuring my Lord's signature to

the bill of exceptions on the ground which has been alluded to, you will equally fail in getting a rule for a new trial upon the same ground.

Application for  
Leave to Move  
for New Trial  
after first Four  
Days of Term.

*Mr. Attorney General.*—Then at all events we should have the decision of the Court, that nothing was ruled upon the late occasion.

*Mr. Baron Bramwell.*—You would only have the decision of the Court to this effect, that my Lord had so reported, and that they adopted that report.

*Mr. Baron Channell.*—Would it suit your purpose Mr. Attorney General, to make a motion now and have it adjourned upon the understanding that it is not to be further argued unless the bill of exceptions is not signed?

*Lord Chief Baron.*—Before you can make a motion at all the bill of exceptions must be disposed of, as it is upon a point of law.

*Mr. Attorney General.*—I think that perhaps my best course, after what has fallen from your Lordships, is this, This is only the second day of Term, I will come here again on the fourth day of Term.

*Mr. Baron Bramwell.*—I was just going to suggest that.

*Mr. Attorney General.*—In the meantime we will examine the point which your Lordship has been so good as to suggest, and see whether we can possibly bring a case of this description within the terms of the Common Law Procedure Act.

---

Wednesday, 4th November 1863.

Motion to apply  
Common Law  
Procedure Acts  
to Revenue Side  
of the Court.

MOTION TO APPLY THE COMMON LAW PROCEDURE ACTS, 1852 AND 1854, AND THE RULES OF PLEADING AND PRACTICE, TO THE REVENUE SIDE OF THE COURT.

*Mr. Attorney General.*—My Lord, I attend your Lordships this morning in consequence of what your Lordship was so good as to throw out yesterday, which has received our careful attention since, and we find that as the law now stands an appeal from any order refusing a motion for a new trial or making a rule absolute in a case of this description upon the revenue side could not be granted; but that it is in your Lordships' power, if you should think fit to exercise it by an act to be done this day, to apply the Common Law Procedure Act so that an appeal would be competent, because I find, my Lords, that by the 26th section you have full power.

*Lord Chief Baron.*—Allow me to take a note of the reference, what is the statute?

*Mr. Attorney General.*—The 22 & 23 Vict. cap. 21. sect. 26, The Queen's Remembrancer's Act, and your Lordships will excuse my appearing to-day, because if I had not done so it would have been too late.

*Lord Chief Baron.*—It is your right to appear to-day or any day that you think the interests of the Crown require it.

*Mr. Attorney General.*—For this purpose, my Lord, no other day would have done, because this is the last day on which it would be possible for your Lordships to make such an order which would be available with respect to the case in question.

*Mr. Baron Channell.*—The defect is not in the Act of Parliament, but in the rules; Have we power to make a rule?

*Mr. Attorney General.*—Yes, my Lord, this is the clause: "It shall be lawful for the Lord Chief Baron, and two or more Barons of the Court of Exchequer, from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court," and as to some other things "as may seem to them necessary and proper, and also from time to time by any such rule or order to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the rules of pleading and practice on the plea side of the said Court to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court." Your Lordships recollect the clause in the Common Law Procedure Act, which I need not therefore refer to, but I may mention that when under that Act

certain rules were made on the 22nd of June 1860, not however extending *quoad hoc*, the last of those rules was in these terms:—  
 “That the foregoing rules shall come into operation and take effect on Wednesday the 24th day of October 1860,” the date of the order being the 22nd of June, “and with respect to any matter of proceeding then pending, these rules may, so far as they are applicable to any step or proceeding to be thereafter taken, be adopted and applied accordingly.” There is nothing in the Act which says that any interval shall elapse between the making of the order and the time when it is to take effect, and I believe, my Lords, that this is the only case in the same circumstances, and if therefore it should appear to your Lordships in your own discretion to be right to make such an order to-day, it would, in my humble judgment, govern the case in hand.

Motion to apply  
Common Law  
Procedure Acts  
to Revenue Side  
of the Court.

*Lord Chief Baron.*—Why could it not be made to-morrow? I admit that I do not see why it should not be made to-morrow.

*Mr. Attorney General.*—Your Lordship may be quite right.

*Lord Chief Baron.*—Or indeed at any time.

*Mr. Attorney General.*—What had occurred to me was this, that if the motion were made to-morrow, it might be doubted whether the rule would have a retrospective effect upon a motion which had been made before.

*Mr. Baron Bramwell.*—What I presume my Lord means is, why could we not make the order the first thing to-morrow, and you immediately move.

*Mr. Attorney General.*—Yes, that, my Lord, would be quite the same thing.

*Lord Chief Baron.*—I am rather inclined to think, Mr. Attorney General, that we might make the rule at any time.

*Mr. Attorney General.*—It is not for me to say what is in your Lordships' power.

*Lord Chief Baron.*—Inasmuch as it is granted to the Court to make all such rules as may seem to them necessary and proper, I apprehend that we might make the rule at any time, and make it retrospective. However, it is safer perhaps to avoid that.

*Mr. Attorney General.*—I think that it would be safer, my Lord. If your Lordships thought fit to make the rule, I think it would be safer not to raise that question as to the manner of making it.

*Their Lordships consulted together.*

*Mr. Baron Bramwell.*—Mr. Attorney General, those rules of which you speak were originally prepared in the office of the Queen's Remembrancer, and I had a good deal to do with the settlement of them. The fact is that the omission, or rather the non-insertion of a rule giving a power of appeal, in this case was intentional on the part of those who prepared them. It was thought inexpedient that there should be such a power. But I may mention that I was not aware that the rules had not made that provision. It did not occur to me when I went over them, and nobody called my attention to it, or else, as at present ad-

Motion to apply  
Common Law  
Procedure Acts  
to Revenue Side  
of the Court.

vised, I should have thought that what was a good rule in an ordinary civil case would be an equally good rule in this case; I mean in a revenue case; I mean in cases under the Act, so that it must not be supposed, if upon consideration we should insert such a rule as that, that we are on the spur of the moment reversing anything which has been deliberately done by the Court. If we should come to the conclusion that such a rule as that ought to be made, it will be upon our attention being called to the matter for the first time. Whether I ought to have noticed it when the rules were under my consideration is another matter, but I certainly did not; the matter did not occur to me at all, but the omission was deliberate on the part of those who originally prepared the rules.

*Mr. Attorney General.*—Perhaps your Lordships would permit me to say that of course I have not mentioned the matter this morning without endeavouring to discharge the duty of considering whether any public inconvenience might arise in other cases from making such a rule, and my strong impression is that, both for the Crown and for the subject, it would be desirable that there should be such a rule.

*Lord Chief Baron.*—I quite agree with you in that respect, and on the present occasion I should have concurred in any mode whatever short of a violation of principle which would have given effect to a desire to appeal. I must say after the experience which I have had for some time, sitting in this Court, that I own I see no reason why there should not be a power of appeal in revenue cases, as well as in any other case; there ought to be, and at all events there ought to be a power in the Court to grant an appeal if it is applied for, and if the Court thinks that it is a fit case for an appeal; at least there ought to be that power in every case.

*Mr. Baron Pigott.*—I confess that I very strongly concur in that. It is very much in the spirit of modern legislation which has put petitions of right on the foot of ordinary actions and given costs to the subject against the Crown; I think it very extraordinary that there should not be appeals in these cases as well as in civil actions.

*Lord Chief Baron.*—The rules were framed by the Queen's Remembrancer in their present shape, whether with the concurrence of the law officers or not I do not know.

*Mr. Baron Bramwell.*—The solicitor for the revenue.

*Lord Chief Baron.*—I presume that some person representing the Government in matters of revenue was a party to the arrangement.

*Mr. Baron Bramwell.*—They were, and in truth it was their apprehending great danger from this power of appeal which caused the rule not to be inserted.

*Lord Chief Baron.*—Mr. Attorney General, the result of your application this morning I take to be this. The Court entirely concur with you in the view of what ought to be, but it would be better for the Court to adjourn a little earlier than usual to-day, for the purpose of seeing whether the rule ought to be made. It

certainly ought not to be done in a hurry ; as my brother Bramwell has said, " on the spur of the moment." We shall consider it, and I own I anticipate we shall make that alteration. We had better let you know whether such an alteration may be made. If it be made you will be here to-morrow morning I presume to move simply for a new trial on all the grounds what may occur to you.

Motion to apply  
Common Law  
Procedure Acts  
to Revenue Side  
of the Court.

*Mr. Attorney General.*—Yes, my Lord, if your Lordships make such a rule there will be no doubt that we shall do so.

*Lord Chief Baron.*—I think that that would be the better course to adopt, because it would leave open to you every objection which may reasonably be presented as to what passed at the trial, and as to what might have misled the jury, although there was no intention to mislead them, and possibly even no error, though what was said may not be free from the objection that it might have been made more clear ; all that I think ought to be open to you. That would not be open upon a bill of exceptions.

*Mr. Attorney General.*—I am much obliged to your Lordship, and if your Lordships should make such a rule there is no doubt that that is the course which we shall take ; if not, of course we shall consider as far as we have time and opportunity what course to pursue.

*Lord Chief Baron.*—Unfortunately I was in communication with the Attorney General only, and not with any other law officer of the Crown, I mean during the last circuit when we were discussing the case. It had occurred to me that if the Attorney General had not resigned, and I own that I had some intention of suggesting to him the propriety of abandoning the bill of exceptions, and moving upon any point which he thought presented a fair subject for a motion. Now that the impediment which has been supposed to exist may be removed in the course of the day, and this proceeding being placed upon the same footing as any other proceeding in the Court, undoubtedly a motion for a new trial with an appeal is a far better thing than a bill of exceptions.

*Mr. Attorney General.*—Oh yes.

*Lord Chief Baron.*—A bill of exceptions is coupled with various old technicalities which perhaps under a better and more enlightened system may be got rid of ; I do not know whether the better course would not be to make an application for a new trial always the subject of an appeal, at all events if the Court think fit, and probably this may be the means of getting rid altogether of a very old and I think not a very convenient mode of correcting the errors of a judge in the course of a trial.

The Court then made the following rules:—

#### COURT OF EXCHEQUER—REVENUE SIDE.

In pursuance of the provisions contained in the 26th section of the 22 & 23 Vict., cap. 21, intituled, An Act to regulate the Office of Queen's Remembrancer and to amend the practice and procedure on the Revenue Side of the Court of Exchequer, "It is

- Rules made by the Court. " ordered that the following provisions of the Common Law Procedure Act, 1854, be extended, applied, and adapted to the Revenue side of the Court of Exchequer; and also that the following rules as to giving bail in cases of appeal shall be in force on the revenue side of the Court of Exchequer.
- If rule nisi refused party may appeal. 1. " In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute the party decided against may appeal.
- Appeal upon rule discharged or absolute. 2. " In all cases of motions for a new trial upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal provided any one of the judges dissent from the rule being refused, or when granted being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed, provided that where the application for a new trial is upon matter of discretion only as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.
- Courts of Error to be Courts of Appeal. 3. " The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for this purpose.
- Notice of appeal. 4. " No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney and to the Queen's Remembrancer within four days after the decision complained of, or such further time as may be allowed by the Court or a judge.
- Form of appeal. 5. " The appeal herein-before mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a judge of the Court appealed from) in which case shall be set forth so much of the pleadings evidence and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.
- Rule nisi granted on appeal; how disposed of. 6. " When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.
- Judgment Court of Appeal. 7. " The Court of Appeal shall give such judgment as ought to have been given in the Court below, and all such further proceeding may be taken thereupon as if the judgment had been given by the Court in which the record originated.
- Powers of Court of Appeal as to costs and otherwise. 8. " The Court of Appeal shall have power to adjudge payment of costs and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process, and otherwise.
- Error upon award of trial *de novo*. 9. " Upon an award of a trial *de novo* by the Court, or by the Court of Error upon matter appearing upon record, error may at once be brought; and if the judgment in such or any other case be affirmed in error it shall be lawful for the Court of Error to adjudge costs to the defendant in error.
- Payment of costs upon new trial on matter of fact. 10. " When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event unless the Court shall otherwise order.



11. "Upon motions founded upon affidavits it shall be lawful <sup>Rules made by</sup> for either party, with leave of the Court or a judge, to make <sup>the Court.</sup> affidavits in answer to the affidavits of the opposite party upon any <sup>Affidavits on</sup> new matter arising out of such affidavits, subject to all such rules <sup>new matter.</sup> as shall hereafter be made respecting such affidavits.

12. "Notice of appeal shall be a stay of execution, provided <sup>Bail.</sup> that within eight days after the decision complained, of or before execution delivered to the Sheriff, bail to pay the sum recovered and costs, or to pay costs when adjudged, be given in like manner and to the same amount as bail in error is required to be given under the rules of this Court, made on the 22nd day of June 1860, or as near thereto as may be applicable, provided that such bail shall not be necessary to stay execution in cases where the appellant is the Crown, the Attorney-General on behalf of the Crown, or the Prince of Wales, or the Duke of Cornwall for the time being.

"The foregoing rules shall come into operation and take effect forthwith, and apply to every cause, matter, and proceeding now pending.

"FRED. POLLOCK.

"G. BRAMWELL.

"W. F. CHANNELL."

"G. PIGOTT.

"Dated the 4th day of November,  
"in the year of our Lord, 1863."

Thursday, 5th November 1863.

---

Motion for Rule for New Trial. MOTION FOR RULE TO SHOW CAUSE WHY THERE SHOULD NOT BE A NEW TRIAL.

*Mr. Attorney General.*—My Lords, in the case of the Attorney General *v.* Sillem, which was an information arising out of the seizure of the ship “Alexandra” upon the 5th of April last by the Crown for a violation of the Foreign Enlistment Act, I have humbly to move your Lordships for a rule to show cause why there should not be a new trial, on the ground of misdirection by the learned Judge, and also upon the ground that the verdict was against the evidence.

*Mr. Baron Bramwell.*—Mr. Attorney General, in order that there may be no mistake, let it be clearly understood that you move on the ground of misdirection, and that the bill of exceptions is abandoned.

*Mr. Attorney General.*—Yes, my Lord.

*Mr. Baron Bramwell.*—Let it further be understood, if you please, that we must take my Lord’s report of what he directed, and act upon that.

*Mr. Attorney General.*—That I understand also.

*Mr. Baron Bramwell.*—And further, supposing that upon the ground of the verdict being unsatisfactory for any reason, we in our discretion grant or refuse the rule, no appeal will be from it under the rules which we announced yesterday.

*Mr. Attorney General.*—Unless your Lordships think fit to grant one.

*Mr. Baron Bramwell.*—Nay, there is no appeal except upon a matter of law. If we should be of opinion that there was no misdirection, but that nevertheless the jury may have acted upon some wrong opinion, and grant a new trial upon that ground, it would not be competent to the defendant to appeal. On the other hand, if we should be of a different opinion, and refuse the rule, and you should desire to take the opinion of the Court of Error upon that question, it would not be open to you to do so. I wish to state for my own part, and I believe I may say for my Lord and my brethren, that it is desirable that those three matters should be clearly understood, namely, that you abandon your bill of exceptions, that we take my Lord’s report of the direction, and that there is no appeal from our decision by either side, except upon a matter of law.

*Mr. Attorney General.*—I am entirely bound by that. Of course, when I speak of misdirection, your Lordships will understand me to include in that both of these propositions, which I perceive from the books have been grounds upon which new trials have been granted in various cases, namely, the omission to give

a proper direction, and also such a direction which in one sense might have been justified, but which, as it was given, had a tendency to mislead, and may have misled, the jury. Motion for Rule  
for New Trial.

Now, my Lords, I will first state to your Lordships the way in which the question arose. The information was filed by the Crown after the seizure which had taken place in the yard of Messrs. Miller and Sons, or Mr. Miller, of Liverpool, who is a ship-builder there; the information was filed upon the 25th of May. There were 98 counts in that information, the great number being rendered necessary by the rather complicated structure of the clause in the Act of Parliament upon which it was founded. In substance it charged the persons whom I am going to mention, and other persons unknown, with various acts against the 7th section of the Foreign Enlistment Act. The persons, my Lord, so charged upon the face of the record were these, the members of the firm of Miller and Sons, or what was supposed to be that firm, (I believe it turned out and was stated in the evidence that Mr. Miller carried on business alone,) who were the builders of the vessel, and in whose yard she was when she was seized—in whose actual possession she was when she was seized, the firm of Fawcett and Company, who are, I believe, manufacturers of machinery at Liverpool, who came forward as the claimants, and said that the vessel was theirs, the firm of Fraser, Trenholm, and Company, whom we proved, as your Lordships will find by the evidence, to be the general agents for the business of the Confederate States (so called) of America at Liverpool, a person named James Bulloch, or Captain Bulloch, who was a special agent of those States at Liverpool for their belligerent business, and a person named Tessier, also employed in that business. Those two individuals, Bulloch and Tessier, and those three firms, Miller and Sons, Fawcett and Company, and Fraser, Trenholm, and Company, with other persons unknown, were all charged in every count of the information with the different acts in violation of the Foreign Enlistment Act which were alleged.

Now the separate counts, my Lords, were founded upon the language of the 7th section, to which I will just shortly refer your Lordships at the outset, not offering any argument upon it at present, but merely that its structure should be observed. The 7th section of the Foreign Enlistment Act is this,—“If any person within any part of the United Kingdom, or in any part of His Majesty’s dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm” in the disjunctive.

*Lord Chief Baron.*—Have you an abstract of the information?

*Mr. Attorney General.*—I have, my Lord; but I am afraid that it is in a shape not very ready accessible to your Lordship.

*Lord Chief Baron.*—It will answer my purpose; there was one handed up to me, which I have somehow mislaid.

Motion for Rule  
for New Trial.

*Mr. Baron Bramwell.*—I should think one might take it for granted that whatever offence was in the Act was included in the information, there being 98 counts.

*Mr. Attorney General.*—Yes, I think your Lordships may take that for granted.

*Lord Chief Baron.*—I should like to have a copy of the abstract.

*Mr. Attorney General.*—I am afraid that I have not a copy of any abstract.

*Lord Chief Baron.*—I could take one of the Solicitor General's.

*Mr. Solicitor General.*—I have not a separate abstract.

*Lord Chief Baron.*—Has any gentleman one?

*Mr. Attorney General.*—I think that probably this will do, my Lord. My learned friend Mr. Jones has one. (*The same was handed up to his Lordship.*) My Lords, perhaps without going into too much detail, I may state in a few words that you will find in the clause of the Act these different heads, which were all taken by the information—first equipping, then furnishing, then fitting out; we did not charge arming.

*Lord Chief Baron.*—That is the very point which I wanted to call attention to.

*Mr. Attorney General.*—We did not charge arming.

*Lord Chief Baron.*—I was not quite certain, but my recollection was that arming was not charged at all in the information.

*Mr. Attorney General.*—No.

*Lord Chief Baron.*—Nothing was charged but equipping, fitting, and furnishing.

*Mr. Attorney General.*—Equipping, furnishing, and fitting out were charged.

*Mr. Baron Channell.*—Each separately charged?

*Mr. Attorney General.*—Each separately charged. Then, my Lords, attempting or endeavouring to equip, attempting or endeavouring to furnish, attempting or endeavouring to fit out, were also each separately charged; then procuring in like manner, then knowingly aiding, assisting, or being concerned in like manner,—each of those in the disjunctive being made a separate offence by the statute. And, my Lords, I ask particular attention to this, because we humbly think that the learned Judge at the trial entirely overlooked the existence in the Act of Parliament of provisions against attempting, or endeavouring, or procuring, or knowingly aiding, assisting, and so on, and addressed, if not his mind, at all events his observations, entirely to the notion of a complete equipping, furnishing, or fitting out in the sense which his Lordship considered that those words ought to bear. Of course we charge in each case that these acts were done with the intent mentioned in the statute, which I apprehend will be found by your Lordships to be the gist of the offence, the prohibited intent, which is this, "with intent or in order that "such ship or vessel shall be employed in the service of any "foreign prince, state, or potentate, or of any foreign colony, "province, or part of any province or people, or of any person

“or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people;” the words follow, “as a transport or store ship.” There is no reason to suppose that this vessel fell within these words, “or with intent to cruise or commit hostilities against any prince, state, or potentate, &c. with whom His Majesty shall not then be at war.” That was the charge made by the information, and, my Lords, it was met by a claim put in on behalf of Messrs. Fawcett, Preston, and Company, the engineers whom I have mentioned at Liverpool, who traversed generally the whole of the information, supporting their *locus standi* in the manner which the Customs Consolidation Act provides for. The Act is the 16 & 17 Victoria, cap. 107., sect. 309, which provides this:—“That no claim nor appearance shall be permitted to be entered to any information filed for the forfeiture of any ship or goods seized for any cause of forfeiture and returned into any Court, unless such claim or appearance be made by or in the true and real name or names of the owner or proprietor of such ship or goods, describing the place of residence and the business or profession of such owner or proprietor; and if such person shall reside at London, Edinburgh, or Dublin, or within the liberties thereof, oath shall be made by him before one of the judges of the Court into which the said ship or goods are returned, or in which such information is filed, that the said ship, boat, or goods was or were his property at the time of the seizure; but if such person shall reside elsewhere” (which was this case, for in this case the claimants resided at Liverpool) “then oath shall be made by the attorney by whom such claim or appearance shall be entered, that he has full authority from such owner to enter the same, and that to the best of his knowledge and belief such ship or goods were at the time of the seizure thereof the *bonâ fide* property of the person in whose name such claim or appearance is entered;” so that, to give a *locus standi* under the statute, and to guard against merely fictitious claims by persons having no interest whatever which can be *bonâ fide* put forward or alleged. In this case an affidavit of the attorney was required, and was made—that he believed that at the time of the seizure these gentlemen were the *bonâ fide* owners. Of course it was only an affidavit to secure a *locus standi in curia*; it would not for any other purpose be evidence as to the circumstances, if they should become material, connected with the ownership.

My Lords, I now come to the evidence which was given at the trial, and I think it will be convenient, having mentioned the grounds on which I move, that I should invert the order of opening the case, and should state to your Lordships the effect of the evidence, applying it to the Act of Parliament in my own way, so as in the first instance to support that ground of my motion which rests on the verdict being against the evidence, and I will afterwards come to the direction of the learned Judge. I think

Motion for Rule  
for New Trial.

**Motion for Rule  
for New Trial.** your Lordships will be of opinion, when you hear that direction, that the jury never had any opportunity whatever of giving a verdict upon the effect of the evidence, in reference to that view of the Act of Parliament upon which the Crown proceeded; it was, in fact, not left to them at all; it was left to them in a totally different way, so as to preclude the exercise of judgment by them upon what we regard as the true and the material question. I am now going to tell your Lordships what the evidence was.

Now, the clause in the Act of Parliament substantially divides itself into two points, namely, that there must have been a furnishing, fitting out, or arming, or an attempt or an aiding, and in this case I should prefer taking my stand upon the words "attempt or endeavour" and "aid" and so on, because the thing was not actually completed. That being so, the evidence of course will be found to be addressed to these two material points:—first, the existence of such an attempt or endeavour, and secondly, the intent and the purpose with which it was going on,—those are the two things. If there was an attempt or endeavour to do it with the prohibited intent, the statute was violated. The evidence, therefore, of necessity had to be addressed to those two subjects; and I will now bring under your Lordships' notice, as concisely as I am able, the material portions of the evidence bearing upon those two points, and your Lordships will recollect, while I do so, that it was uncontradicted evidence,—I mean that no evidence whatever was called upon the other side; this evidence, therefore, was the only evidence upon which the jury had to form their opinion.

Now I will first of all take the evidence as to the vessel, and her condition as to preparation and equipments at the time when she was seized, and afterwards the evidence as to the intent. We will take the first head first,—the evidence as to the condition, character, and state of the vessel, and preparations and equipments. Now it appeared from the evidence of the Custom-house officer, Mr. Morgan, who had charge of the vessel, and who seized her, that she was launched in March, that she was seized upon the 5th of April, that at the time of the seizure she was incomplete, but that she had three masts on, with lightning conductors, and portions of her machinery and other fittings actually on board, and other portions in progress. Now with regard to her character and the objects and purposes for which she was constructed and built and being fitted out, we have evidence which I will give your Lordships, as far as is necessary, in detail; but I will give the effect of it first in a few words—that she was built as and for a gunboat; that she had bulwarks and a rudder adapted only and peculiarly fit for purposes of war; that she was certainly unfit for any mercantile purpose whatever, though she might possibly have been used for a yacht; that although she had at the time when she was seized no fittings actually placed upon her to enable her to receive guns, yet it wanted only work which could be done at any time, and with the greatest facility, to adapt her to receive two or three pivot guns, which would be the proper

number for her, which would sweep over her bulwarks, and make her serviceable as a gunboat, for which she was meant. So much with regard to her character. Then with regard to the fittings—

Motion for Rule  
for New Trial.

*Lord Chief Baron.*—Will you allow me to call your attention to what a captain in the Royal Navy said of her?

*Mr. Attorney General.*—I am going to give it to your Lordships in detail.

*Lord Chief Baron.*—He said, “She is without any of those appurtenances which indicate an intention of guns being put “on board.”

*Mr. Attorney General.*—I have already said so, my Lord; but he also said, as I shall show by the evidence immediately, that it could be done at any moment of time, and therefore, she being seized when incomplete, of course not everything would be done, and probably those things would be left to the last which were most unequivocal with regard to the determination of her character and her purposes. I wish your Lordships to see what it was that was done, what the evidence did prove upon that subject. I am going to mention one thing more. All that I have hitherto said connects itself with the structure of the vessel; but then there was further evidence going to what I apprehend is in the strictest and most appropriate sense fitting, furnishing, and equipment, as distinguished from construction, namely, evidence as to the machinery, the engines, the boiler, and other things of that description constituting part of the furniture of the vessel, thereby to enable her to go to sea, which were either actually on board or actively in progress at the time. There was also further evidence as to certain hammock nettings and stanchions, of which your Lordships shall have the detail; and there was evidence, not, perhaps, so directly and unequivocally connected with the vessel, as to the preparation of gun carriages and guns for the ship.

I have told your Lordships the effect, generally, of the evidence, and I am now going to give you some of the detail of it as far as is necessary. I will, first of all, take the evidence of Mr. Barnes, an engine-driver, which, my Lords, is at pages 39 and 40.

*Lord Chief Baron.*—Of what?

*Mr. Attorney General.*—Of the print from the short-hand writers’ notes which I hold in my hand of the evidence.

*Lord Chief Baron.*—Which we have not a copy of at all. Probably you will have the kindness to furnish it; it is not so necessary for me because I have my note.

*Mr. Attorney General.*—It is from the short-hand writers’ notes, my Lord.

*Lord Chief Baron.*—I have never had that at all for any purpose.

*Mr. Attorney General.*—I am sorry your Lordship should not have it in your hand whilst I have it.

*Lord Chief Baron.*—I certainly now see it for the first time. I have had nothing furnished to me but a copy of half of Sir Hugh

Motion for Rule  
for New Trial.

Cairns' speech, the reply of the Attorney General, and my own summing up.

*The Queen's Advocate.*—I will hand up my own copy to your Lordship.

*Lord Chief Baron.*—It is not for myself that I want it, because I have my own original notes, to which I shall adhere; but it would be desirable that my learned brothers should each of them have a copy.

*Mr. Attorney General.*—My Lord, I am about to read from a book which has been printed by my opponents; it is their corrected copy of the short-hand notes, which I prefer reading to reading ours, which does not, of course, differ from it; but there are some passages which may have been corrected in some way by them, and I prefer taking their copy.

*Lord Chief Baron.*—If you have the benefit of a printed book, I think you should at least give my learned brothers the benefit of it, that they may have the same advantage.

*Mr. Attorney General.*—That, my Lord, is the same book as the one which I am about to read from (*a copy being handed up to the Bench*).

*Lord Chief Baron.*—Have you not the means of giving a copy to each of the Court?

*Mr. Attorney General.*—I wish, my Lord, that we had; but with some difficulty as to identifying the paging, which I dare say is not very great (I dare say my learned friends who are with me will follow me), the other book, which is our copy, may be used in the absence of a sufficiency of our opponents' copies.

*Mr. Baron Pigott.*—Mr. Attorney General, we had better not take your copy, which is turned down.

*Mr. Attorney General.*—I rather intended to use myself the book which was furnished to me on the other side; it is their copy.

*Lord Chief Baron.*—Have you no spare copies of your own edition?

*Mr. Attorney General.*—Yes, my Lord, that is our own.

*Mr. Solicitor General.*—We have sent for one or two copies, my Lord, and they will be here.

*Mr. Attorney General.*—This is the evidence of Barnes; these are short passages. I am not going to trouble your Lordships with a needless detail. He was, my Lords, an engine-driver in Messrs. Miller's employment, and he states in his evidence that he had been concerned in the yard in the building of three gunboats, one called the "Oreto," of which I will say nothing, and two called the "Penguin" and the "Steady," which were built for the English Government.

*Mr. Baron Channell.*—We understand you that having given us, as you say, your statement as to the general effect of the evidence, you are now going to analyze the evidence upon the one point first?

*Mr. Attorney General.*—Yes, my Lord.

*Mr. Baron Channell.*—And you will afterwards take the other evidence as it supports the other points which you make?



*Mr. Attorney General.*—Just so. He speaks, my Lord, of having in the yard of Messrs. Miller been concerned as their servant in the building of three gunboats, two of which were built for the English Government, called the “Penguin” and the “Steady,” and the third was called the “Oreto,” a boat of which I will say nothing, though most people have heard of her. At the bottom of my page 39 he is asked this—

Motion for Rule  
for New Trial.

*The Queen's Advocate.*—It is page 37 in the other copy (*the official copy*).

*Mr. Attorney General.*—“Do you recollect a screw steamer called the ‘Alexandra’ being built there?—Yes,” he frequently went over her. “What is she like?—She is like the other gunboats, only smaller. Is she like the ‘Oreto’?—Yes, she is like her, only smaller. Like the ‘Oreto,’ the ‘Penguin,’ and the ‘Steady,’ only smaller?—Yes, only smaller.” That is what Mr. Barnes said at page 39 and at page 40.

*Mr. Solicitor General.*—I have found another copy of the larger book; it is the same as Mr. Baron Pigott has, I think. (*The same was handed up to their Lordships.*)

*Mr. Attorney General.*—I do not think I need trouble your Lordships with anything else which Barnes said.

Then comes Hodgson, a packer in the service of the claimants, Messrs. Fawcett and Company, who were making the machinery, and in page 54 of the smaller book, and in page 51 of the other, he proves this, that he received orders in the yard of the claimants, Fawcett and Company, to take the machinery, clenches, and bolts, which he identifies as made for this vessel, to the gunboat. This was his evidence upon the subject; he is asked, “Did he,” (that is, Mr. Speers, the manager or foreman of Messrs. Fawcett and Company’s works,) “give you any orders?—Yes. What were the orders?—To see if the things were ready, and to take them if they were ready, as the men were waiting for them in the yard. To take them where?—To take them up to Mr. Miller’s yard, or to the boat. Or to where?—To the gunboat. Those,” he adds, “were the words of Mr. Speers, as far as I remember. *Sir Hugh Cairns.*—As far as you recollect?—Yes.” Then he is asked, “Where did you take them in consequence of that order?—I took them to the yard, and left them in the stores of Miller’s yard. What became of them afterwards?—The men would be waiting to use them when I got there. What ship was it?—The ship now called the ‘Alexandra.’ Was the ‘Alexandra’ in the stocks at the time?—Yes. You saw the things in consequence of that order taken to the ‘Alexandra’?—Yes, the men have been waiting for them, and when I have taken them they have said, ‘Are those for the gunboats?’ and I have said ‘Yes.’” That is the evidence of the packer. Now, your Lordships recollect that this packer Hodgson is the servant of Fawcett and Company, the claimants, who are making the machinery. The ship is identified not only by the evidence which I have read, but also by the number 2,209, by which she was known by the packer of Messrs. Fawcett and Company.

Motion for Rule  
for New Trial.

Then we have two persons who are very conversant with ship-building business, and the captain in the navy, to whom my Lord has referred. The two persons to whom I allude are Mr. Black, a ship carpenter, a very intelligent witness, and Mr. Green, a ship-builder. I will take what Mr. Black says about the bulwarks at the bottom of page 65 of my book.

*The Queen's Advocate.*—It is at page 62 of the other.

*Mr. Attorney General.*—He mentions several things respecting the strength of the frame, and so on. But I will take him up where he speaks about the bulwarks. “Did you examine the bulwarks?—Yes. Did anything strike you with regard to the bulwarks; were they the bulwarks of a merchant vessel?—No. For what reason were they not?—From their extraordinary strength. Did you mark anything with respect to their height?—Their height is about  $2\frac{1}{2}$  feet. Is that high or low?—It might do with regard to height for a merchant vessel, but it is generally higher for a merchant vessel.” That is, as I understand, that a merchant vessel generally has higher bulwarks. “But you say that the bulwarks were stronger than are used in a merchant vessel?—Yes. And likewise lower?—Yes. What are the upper decks made of?—Pitched pine. Have you ever seen pitched pine used for the decks of any vessel except vessels of war?—No. You never have?—No, except they are between decks. Do you consider this vessel altogether adapted to mercantile purpose? It is not qualified for mercantile purposes.”—Then the form of the question is altered. “For what is she adapted?—She is adapted for war purposes. What is her appearance?—A very fine appearance, she looks a handsome piece of architecture, very fine lines, capable of great speed according to the power of machinery. What kind of war vessel should you say she has been built for? *Sir Hugh Cairns.*—He says she is ‘adapted for’ not ‘built for.’” The answer is “for a gunboat.”

Then at page 107, I think, comes Mr. Green.

*The Queen's Advocate.*—It is at page 102 of the other book, he is examined twice.

*Mr. Attorney General.*—He was a ship-builder of many years' experience at Liverpool; he examined the ship, he is asked “How was she built?—I found her bulwarks differently formed from any merchant vessel or any other vessel than a vessel of war.” Then he is asked to go on with the description; he says, “The bulwarks, to which I first alluded as being different from any other vessel but a ship of war, were composed of very thick planks, three inches thick inside and out. *Lord Chief Baron.*—What was it?—It was teak. *The Queen's Advocate.*—What was the thickness?—The inside and the outside planks were three inches thick in the lower part, and two and a half inches thick in the upper part, and they were about two and a half feet deep. That would be from the deck to the top. Do I understand from you that that is an unusual thickness for a merchant vessel?—Yes.” He says that she had three masts, and a propeller under

“water. He gives her dimensions; it is not a large ship of the kind. “Did you observe her rudder?—The rudder was very strong, and a very thick-formed rudder, unusually so. Was it thicker and stronger than would be used for a merchant vessel? —It was.” Then he comes to the hammock racks, which I will observe upon presently. I will pass it over now, because that I think belongs to the furniture rather than to the structure.

Then I think that I may go to page 111 in his cross-examination.

*The Queen's Advocate.*—It is at page 105 in the other book.

*Mr. Attorney General.*—He is asked this?

*Lord Chief Baron.*—Who is this?

*Mr. Attorney General.*—Mr. Green. “Just one word about the bulwarks of this vessel, you say they are peculiarly strong?—I do. Does your knowledge enable you to tell me whether in a vessel of that construction it is necessary to have the bulwarks strong to strengthen it?—They have nothing to do with the strength, it has rather a tendency to weaken the vessel than to strengthen her. Did you examine the build of the vessel below?—I did not examine her very distinctly below. Was she in the water at the time you saw her?—In the water. Will you tell me as a ship-builder whether it is not a fact, that bringing up the bulwarks with additional strength added to the strength of the vessel?—No, it did not, it weakened her; it was an unnecessary weight unless for resistance of shot?” I think that that is all upon that subject.

Then comes Captain Inglefield, to whom my Lord has referred: his evidence in my book is at page 61.

*The Queen's Advocate.*—It is at page 58 in the other copy.

*Mr. Attorney-General.*—He was a witness whom everybody agreed in appreciating very highly, and I will, therefore, read his evidence, which is not long, pretty nearly at length. He is the commander of Her Majesty's ship “Majestic,” stationed at Liverpool. He is asked, “Have you, assisted by the carpenter of your ship, examined the ‘Alexandra,’ lying in the Toxteth Dock?—I have. Since the time of the seizure, I believe?—Yes. Did you carefully examine the fittings as far as they have gone?—I did. Are you able to describe to the jury the character of the vessel, as to her timber and construction generally?—I can. Of what timber is she built?—Principally of teak; her upper works are of other materials; the kind of wood I cannot exactly say, but I should call her a strongly built vessel, certainly not intended for mercantile purposes, but she might be used, and is easily convertible into a man-of-war. And speaking of the strength of the vessel, is she, in your judgment, of such strength as would be adapted to her being used as a man-of-war?—She is. Did you find whether she had an accommodation for men and officers such as would have to serve on board a man-of-war?—She has. And as regards stowage room and the building of the vessel, what say you to that?—As regards stowage room, she has only stowage room sufficient for the crew, considering the berthing of the crew to be for about 32 men. And as regards her build

Motion for Rule  
for New Trial.

Motion for Rule “ generally, is it your opinion that she is adapted for a man-of-  
 for New Trial. “ war?—She is quite capable of being converted into a man-of-  
 “ war without having at the time I saw her any appearance of  
 “ fittings for guns;” that was the answer to which his Lordship  
 referred. “ You say that there were no guns or immediate pre-  
 “ paration for guns?—There were none. But having regard to the  
 “ building of the vessel, might she or not, in your opinion, be fitted  
 “ for guns?” There was a little interruption, and the Attorney  
 “ General put his question again, and the answer was this, “ She  
 “ is of sufficient length to receive guns, but without any of those  
 “ appurtenances which would indicate that guns were about to be  
 “ put on board. Would you tell us to what you refer in speaking  
 “ of the appurtenances which indicate an absolute intention of  
 “ putting guns on board?—Ring bolts at the side and plates on  
 “ the decks upon which pivot guns would turn. *Sir Hugh Cairns.*  
 “ There were none of those.” Then the Attorney General asked,  
 “ Would there be any difficulty in your judgment in adding to the  
 “ ship as she is now those preparations for guns?—No difficulty.”  
 His Lordship interposed and said, “ Not only no difficulty, but it  
 “ could be easily done?” Then the answer was, “ Easily con-  
 “ verted into a man-of-war. *The Attorney General*— When  
 “ you speak of a pivot on the deck, do you speak of three guns  
 “ or of several guns?—She might have two or three pivot guns.  
 “ Would she, according to the ordinary arrangement now-a-days  
 “ of men-of-war of her size, probably carry two or three guns, or  
 “ more, on pivot?—Probably three guns. Would those, accord-  
 “ ing to the ordinary course in these matters, be guns varying in  
 “ size, or guns of the same size?—Of varying size.” He is  
 asked, “ Would the smaller or the greater guns predominate in  
 “ number?” He says, “ I could only tell what guns would be  
 “ fitted to the vessel by knowing what size was intended to be  
 “ put on board; if they were smaller guns they must have ports”  
 (there are no ports to the ship); “ but if guns of certain dimen-  
 “ sions, they would be pivot guns, and would fire over the bul-  
 “ warks. Without ports?—Without ports.” Then he is asked,  
 “ I suppose if it were intended that they should fire over the  
 “ bulwarks, the bulwarks would be constructed comparatively  
 “ low, would they not?—Yes, they would. How did you find  
 “ the bulwarks in this ship?—Low, but not similar to the bul-  
 “ warks of gunboats in our service. Over which they were to  
 “ be fired?—Of certain dimensions.” The Lord Chief Baron  
 says, “ These were low, but not low enough according to our  
 “ service, was, I think, your answer?—Not the same description  
 “ as those in our service. They would be flying bulwarks.” I  
 suppose he means that those in the service of the British Govern-  
 ment would be flying bulwarks; these are fixed bulwarks. “ But  
 “ would there be any difficulty, without proper gun carriages, in  
 “ firing guns over those bulwarks?—It would be entirely depen-  
 “ dent on the size of the gun. But with a proper adaptation of  
 “ the size of the guns it might be done?—Certainly. About what  
 “ height, so far as you recollect, of gun carriage would be re-

“quired to enable the gunners to fire over those bulwarks?—  
 “The gun carriage and slides in different kinds of guns vary  
 “very much in size; therefore I must know the kind of gun to  
 “be able to judge of the height or size of the carriage. It would  
 “depend on the kind of gun. Yes; but with certain kinds of  
 “guns it might be done?—Perfectly.”

Motion for Rule  
 for New Trial.

Then he is very shortly cross-examined. It is right to read what passed then. He is asked to give the grounds of his calculation of 32 men for the crew, which he does. He says it would be rather close quarters. Then he is asked, “You say that the vessel was fitted for a yacht, and is easily convertible to a vessel of war.” I do not think that that was the language of the witness that she was fitted for a yacht. The question proceeds, “She could be used, I suppose, for mercantile purposes; not merely for a yacht, but she was capable of being used for mercantile purposes?—No, she was not capable of being used for mercantile purposes, because she had no stowage for merchandise. What state were her cabins in when you saw her?—They were not finished, but they were all laid out and bulkheaded off. Besides the accommodation for men, there were cabins for five officers, a captain’s cabin, and a mess place. Were the cabins fitted up, or did you merely see the partitions between them?—They were partly fitted up; sufficiently to distinguish them as cabins. What was the difference between the cabins you saw and the sort of cabins that might be found in a yacht, supposing she was to be used for that purpose?—No difference.”

My Lords, that is the evidence as to the structure of the ship and the preparations connected with the structure for a particular use and service, and giving her a particular character. I have read that evidence to your Lordships, and you find that the witness who is in the claimants’ workshops says, that he was ordered to carry the machinery to the gunboat; the other witness, the engine-driver, says that she is just like the other gunboats which had been built here before, but built for the Government; Captain Inglefield says that nothing is wanted but to put in the pivot plates for the guns to run round, and the bolts; that that can be done at any moment; that that is not done yet, but that she is in every respect adapted for a ship of war, and nothing else; and Mr. Black and Mr. Green tell us that she has bulwarks which would be worse than useless, and absolutely injurious, unless she were meant for a ship of war,—bulwarks specially adapted to resist shot, and bulwarks which would be an absolute incumbrance if she were used for any other purpose.

But now we come to the fittings, furnishings, and equipments, distinct from the structure. I trench here upon ground which we shall find very material when we come to the questions of law. I say that it is utterly immaterial whether these equipments are of a warlike character or not; if the vessel is meant for warlike purposes, any equipment whatever for that purpose, however ambiguous in its character, is sufficient; and here, I think, is the

Motion for Rule  
for New Trial.

source of the glaring fallacy which seems to have pervaded some part of the argument, and not to have been entirely seen through by the learned Judge who tried the case. Any kind of furnishing and fitting out whatsoever is against the statute, provided always that the intent and the purpose is proved. What I have already said goes far, I think, in the direction of proving intent and purpose, though I have not at present referred to it with that object; but I now wish your Lordships to see what had been done in the way of equipment and furnishing and fitting out, which was in progress, and which of course was meant to be completed, which is separable from the mere structure of the ship and from the mere ship-builder's work. The fitting out and the furnishing was going on at the same time that the building was going on, and it was being done by Fawcett and Co., the claimants; and in the evidence of Mr. Barnes, Mr. Robinson, and Mr. Carter, three of the people who were at work about it, we shall find what was the exact state of things as to that and as to the hammock nettings, which I postpone, which other witnesses, Mr. Morgan and others, speak to. Mr. Barnes' evidence is at p. 41 of the smaller book.

*The Queen's Advocate.*—It is at page 36 of the other.

*Mr. Attorney General.*—Mr. Barnes was, I think, an engine-driver in the yard of the builders, Messrs. Miller, and with regard to the progress which had been made in fitting up the ship, and with her appointments and appliances; he says this at page 41. He is asked, "What was brought there to be put into the 'Alexandra'?"—I did not see anything brought there, only the "boilers. Who brought the boilers?"—I cannot say who brought them. Where were they put on board the 'Alexandra'?"—In the dock. I did not see them put on board. I saw them after they were in. In the 'Alexandra'?"—Yes. Where was it that you saw them in the 'Alexandra'?"—In Toxteth Dock. Were any of Messrs. Fawcett and Preston's people there then?"—Yes, the boiler makers. Some of the boiler makers in the employ of Messrs. Fawcett?"—Yes. They were in the 'Alexandra' then?"—Yes. It would be about those boilers?"—Yes."

Then there is Mr. Robinson, who is, I think, a joiner. There is a little passage in his evidence. "He was being employed," he says, "just before the beginning of his cross-examination, by the direction of Messrs. Fawcett and Preston's foreman, in Messrs. Miller's yard, upon the 'Alexandra,' in fixing a frame for the pitch of the propeller shaft;" and Carter, who was a joiner in Messrs. Fawcett and Company's yard, at page 44, in the beginning of his examination, is asked this question, "For some time before you left in April last, were your masters, Messrs. Fawcett, Preston, and Company, making machinery for a propeller boat?"—Yes. Was the boat for which the machinery was being prepared known in your workshop by a number?"—Yes. What was the number?"—2,209." And then he identifies the "Alexandra," on board of which he has been, with the ship which was so numbered. Then at page 53 Mr. Hodgson, the packer, gives evidence.

*The Queen's Advocate.*—That is at page 48 of the other book.

*The Attorney General.*—He speaks of machinery being made for these ships, and says that it had to pass through the packing-room, and that it was taken to this ship. He is asked, "Were you sent for machinery for that number?—Yes. And for clenches and bolts?—Yes. You had to pack them?—I took them up myself. Did you take them to the ship?—Yes. And you know that they were for that ship by that number?—Yes." Then he repeats that, in the next page, about taking, by order of the foreman, machinery, clenches, and bolts to the gunboat; and at page 59 we are told by the same witness, I think, of the work which was going on at the very time of the seizure, and which was stopped upon the seizure. "Were any orders given by Mr. Speers" (that is the manager) "that night for sending anything on board her?—Yes. Nothing more was to be done; was that after the seizure?—Yes. Do you recollect any orders given before which were countermanded by that order; were any orders given before the seizure to take anything down to the ship?—They came down from the workshops to the packing-room. What were they?—Eccentric pump-buckets, and bright work. Those were to have been put on board, but were stopped?—No, they were in the packing-room, and were to go down in the morning when she was seized." That is also part of the fitting and the equipment.

Motion for Rule  
for New Trial.

Then we come to the question of the hammock nettings, which your Lordships will find not only relate to the same matter, namely, furnishing and fitting up, but have a special connexion with the warlike purpose. The evidence as to that is, first, that of Mr. Morgan, the seizing officer, who, at page 21 of the small book, is asked, "When you seized the 'Alexandra,' what was going on at the time on board the ship; was she completed?—When I seized her, about the time of the seizure the workmen were variously engaged on board her. Do you remember whether they were preparing anything for the hammock nettings?—Yes, they were fitting the stanchions for the hammock nettings. Were these iron stanchions on board the ship in the hold?—They were fitted in their places." They were fitting the stanchions for the hammock nettings. As to the hammock nettings, if your Lordships will turn again to the evidence of Mr. Green, the shipbuilder, at page 108 of my book, and some subsequent pages, we shall have a little further light about the matter.

*The Queen's Advocate.*—It is at page 102 of the larger book.

*Mr. Attorney General.*—At page 108 he is asked this question, "You have spoken of the bulwarks; did you observe anything about the bulwarks?"

*Lord Chief Baron.*—What witness is this?

*Mr. Attorney General.*—Mr. Green, my Lord.

*Lord Chief Baron.*—We have not copies here.

*Mr. Attorney General.*—They will be here shortly, my Lord; there are some on the bench. The question is, "You have spoken of the bulwarks; did you observe anything about the bul-

**Motion for Rule for New Trial.** “works, any arrangements made for the upper part of the bulwarks to be fitted up with anything?—I discovered several iron stanchions for hammock racks, which were not put up, but there were arrangements being made for the staples to receive them; they were on board, but there were staples in the side of the vessel to receive them. What, in your judgment, were the hammock racks for?—For hammocks. Is that usual on board a merchant ship?—Very seldom.” Then I pass over something about the scuttles and hatchways not being suited for a merchant vessel, which I will not dwell upon, but will go to page 111 in my book.

*The Queen's Advocate.*—It is page 106 in the other.

*Mr. Attorney General.*—In cross examination he is asked this question, “According to your experience in yachts, are the hammocks occasionally put up on these hammock racks?—Very rarely. Do they ever do so?—I have known large sailing vessels fitted up somewhat similar.”

*Lord Chief Baron.*—This, I think, is the cross-examination?

*Mr. Attorney General.*—Yes, my Lord. “And fitted with conveniences for putting the hammocks on the bulwarks?—Yes. The sole object of that is for the purpose of greater cleanliness among the men?—Yes. And for having the hammocks put from below to air them?—Yes; and there is another object. Their original intention was to resist shot; that was their original intention. The object when it is used in a yacht is for the purpose of airing the hammocks of the men, is it not?—Yes.” Then, in his re-examination at page 112, he is asked a little more about it. *The Queen's Advocate* says, “I did not understand what you said about the hammock racks as to their resisting shot.—The original fixing of hammocks on the hammock racks was to resist shot from musketry, which they will do.” Your Lordships understand perfectly how they will do it; it is like a pillow or something which receives the shot and deadens it. The next question is, “As I understand you, that is not usual on board merchant ships?—Very rarely so.”

My Lords, I have, I think, given you that portion of the evidence which relates to these things, and which is unequivocally connected, beyond the possibility of doubt, with the ship itself. I will now refer you to those parts of the evidence, as to which I admit it would have been for the jury to say whether they were satisfied or not that these guns and gun carriages were meant for this ship, but which show the contemporaneous preparation under the same superintendence and by the same persons, the claimants, Messrs. Fawcett and Company, of just such three guns and gun carriages as, according to Captain Inglefield's evidence, would be natural and useful to be put on board this ship. Your Lordships will find the evidence on that subject to be that of Robinson and Carter at page 42.

*The Queen's Advocate.*—Robinson's evidence is at page 40 in the large book.

*The Attorney General.*—At page 42, Robinson, a joiner, in



the employment of Messrs. Fawcett, Preston, and Company, is asked this question, "Was it your business to make gun carriages?—Sometimes. Do you remember in particular making gun carriages, or helping to make gun carriages, for three guns in particular?—Yes. What were the guns that you were making gun carriages for?—Pivot guns. How many, I mean?—Three. Was there one large gun?—I believe there was. And two other smaller guns?—Yes." Then he says that Carter was helping; then he speaks of the intervention of a gentleman named Hamilton, which I will reserve until I come to the second branch of the case, namely, the intent; because I shall have occasion to come back again to it. He inspected the making of those gun carriages.

Motion for Rule  
for New Trial.

Then Carter's evidence is at page 46 of my book.

*The Queen's Advocate.*—It begins at page 41 of the large book.

*Mr. Attorney General.*—Carter is a person who was concerned in the preparation of the machinery and guns. He is asked at page 46, "Do you remember while the machinery was in progress for the 'Alexandra,' whether any gun or guns were prepared?—Yes, they were preparing some at the same time as she was in the building. I think you said some carriages just now? Some carriages and guns were prepared at the same time."

*The Queen's Advocate.*—That will be about ten lines from the bottom of page 43.

*Mr. Attorney General.*—"At the same time that the machinery was being prepared as I understand you?—Yes. Was it any part of your business, and were you employed with regard to the gun carriages and the slides for those guns?—I was working at them." Then he is asked about the numbers, and he is able to give what he believes to be the numbers of the two small guns, namely, 2,205 and 2,204; he could not remember the number of the large one. "Of the large one I would not say." He says he could not say one way or the other what the number was, and in that way he could not actually prove that the large gun was meant for this ship; but by circumstantial evidence it is connected with the rest. I do not know whether I may read this question and answer at page 47. "As to the manufacture of the guns and gun carriages, I think you said it was going on at the same time as that of the machinery?—Yes." Then the Attorney General asks whether "the whole was treated as one job?" Counsel interposes, and says, "He has not said so." He is asked whether it was so or not, and he says, "No." I suppose he means that they had different things; it may or may not be an answer tending to separate the purpose; that would be for the jury to judge. "Were they, as far as you could see, manufactured for use in the same vessel as the machinery or not?—That I could not say; they might be or they might not be." Of course it does not prove that they were, but it shows plainly that he had no knowledge to the con-

Motion for Rule  
for New Trial.

trary. Then at page 48 of the evidence of the same witness he is asked, "Do you remember about what time it was that the casting of the guns for the carriages was going on?—It was all going on together."

*The Queen's Advocate.*—That is at page 45 of the large book.

*Mr. Attorney General.*—"At the same time that the rifling of the small guns was going forward?—Yes. As to the rammer and sponges for the guns, were those made in the same shop?—No. In the pattern shop?—Yes. That is another place, is it?—Yes. Were those gun carriages of a common or an unusual kind?—They were good ones. Were they of an ordinary description, or were they rather difficult to construct?—Rather difficult, I should say. Not of a very ordinary or common description?—No. Do you remember what they were made of?—English elm. And of what were the slides made?—Teak wood. Did you happen to know where the teak wood for the slides was obtained?—Yes. Where?—At Mr. Miller's. At Mr. Miller's yard?—Yes." It is right to state that in cross-examination he was asked whether Mr. Miller dealt in timber, and he said that he did. It is for your Lordships to judge of the weight of that part of the evidence.

I do not think that there is anything more which I need trouble your Lordships with upon that subject. I will not read anything to which exception is taken, and about which there might be a dispute as to whether it was lawful. I do not know; your Lordships will judge. Let it be considered unread, if your Lordships think that it was an objection which the Court ought to have allowed. Hodgson is asked at the bottom of page 55 and the top of page 56 this. He speaks of taking the clenches and the bolts on board the "Alexandra" after receiving a certain order, and in consequence of that order. Then he is asked, at the bottom of page 55, "Do you recollect packing any of the guns that were made at that time?—No, not the large ones; I packed the small ones. How many guns were there for that job?" The answer is, "Intended for the boat, three." Then Sir Hugh Cairns says, "Really my friend ought not to put such questions. I object to my friend putting his question in that way, 'for that job.' We have not heard that there were any guns for any job yet." I cannot help thinking that the answer was legitimate, and that the jury would have been able to apply it. However, so much for the evidence about those guns and the gun carriages; it stands on a different footing from the rest in this respect, that it was open to argument whether the evidence unequivocally connected those guns and those gun carriages with the "Alexandra." With regard to all the other equipments and fittings which I have mentioned of a character which was not so distinctly warlike, there was no doubt about it.

I now come to the evidence as to the intent and the purpose. I said that when I had gone through that evidence, I would examine its proper application with respect to the Act of Parliament. Your Lordships will remember that I have already

said that I consider the clause in the Act of Parliament clearly and distinctly to lay this down; that any species whatsoever of furnishing and fitting, or of equipment, is against the clause, if it be with intent or in order that the ship or vessel shall be employed in the belligerent service of a foreign people or state, against persons with whom Her Majesty is not at war, and that it is wholly unimportant in that point of view, whether the particular furniture, the particular fitting, or the particular equipment, is of a character which would be equally useful in ships not of a warlike kind, or not; and it is not necessary that it should have a specific character, if the warlike destination and purpose of the use and employment of the ship is made out. I think that I have at all events given your Lordships evidence quite enough to make it clear (and that evidence is not contradicted) that this ship was specially adapted in her construction and in her bulwarks more particularly for warlike purposes, was built for warlike purposes, and that she was equipped, fitted out, and furnished, *de facto*, so as to enable her to take the seas at the time when she was seized. I now come to the evidence bearing upon the question of intent.—It stands thus: My Lords, we proved in a manner, which I should have thought clear beyond the possibility of doubt, and which was wholly uncontradicted, that these things were done under the superintendence and with the interference of the persons whom we proved to have been the agents of the Confederate States, for the purposes of their war service, and those persons, my Lords, are these:—Captain Bulloch in the first place, specially sent to this country for that purpose, specially sent to this country manifestly to organize here the means of carrying on war on the seas, as the servant and the officer of the Confederate States; Mr. Hamilton, another officer and servant of the Confederate States obviously employed for like purposes, the firm of Messrs. Fraser, Trenholm, and Company, mentioned in the information.

*Mr. Baron Channell.*—I did not catch Mr. Hamilton in your opening of the information.

*Mr. Attorney General.*—No, my Lord, when the information was filed he was not known to us; he is not named, we say “persons unknown,” which is quite lawful. Of course with regard to him there was not the same notice upon the face of the information that there was as to the others.

*Mr. Baron Channell.*—I understand you.

*Mr. Attorney General.*—Then there is the firm of Fraser, Trenholm, and Company, named in the information, interfering with regard to the construction of this ship, by one of their partners, named Welsman, who we proved was one of the gentlemen at the office at Liverpool, which we proved was the seat of the agents of the Confederate States, who conducted their belligerent business, and who paid the officers on board the “Alabama” and other ships constructed here, thus using the neutrality of this country, through which those payments were made. Then there is a Captain Tessier also found interfering, whom we proved to be connected in like manner with that

Motion for Rule  
for New Trial.

service, and more especially upon the occasion of taking out to the "Alabama" her stores and munitions, which it was thought convenient to put on board elsewhere than within the territory of the Queen.

My Lords, that is the first head of the evidence bearing upon this part of the case—evidence of *res gestæ*, evidence depending upon the actual interference of these people, both at Messrs. Miller's yard, and at Messrs. Fawcett's workshops, and at the same time the most unequivocal proof of their character. Then we have, in addition, the direct admission of Mr. Miller, the builder, in whose possession the ship was, and out of whose possession she was taken, that she was being built under a contract entered into jointly by Messrs. Fraser, Trenholm, and Company, and Messrs. Fawcett and Company with the Confederate States to be employed in their service.

Now I will first of all give your Lordships the evidence which qualifies the persons whom I have named as the agents in this country of the Confederate States. The proof of that is principally to be found in the evidence of two persons, named Yonge and Chapman. Now, my Lords, I may say one word with regard to the line of cross-examination adopted as to those witnesses, and the course taken in addressing the jury, by the very able counsel who then appeared for the claimants. There were no other witnesses who were damaged the least in cross-examination in any sense, but certain things appeared with regard to these gentlemen which are no doubt very fairly open to observation. Your Lordships will hear what those things were in time, but you will find that every word which could be founded upon that cross-examination was merely *in prejudicium*, and could not possibly be addressed to any candid mind for the purpose of influencing a determination according to the truth of the evidence, because what these witnesses proved did not rest upon any doubtful matter, it was established and confirmed, not merely by their statements but by the documents which were produced and placed beyond the reach of controversy, some of them produced by these gentlemen themselves, Messrs. Fawcett, Preston, and Company, or Messrs. Fraser, Trenholm, and Company, whose character was in question, and there could be therefore no doubt whatever as to the facts which they proved whether those were witnesses of a kind which in other respects one would like to be identified with or not. I am going to give you the evidence which they give. I will take first the evidence of Yonge.

*The Queen's Advocate.*—It is at page 113.

*Mr. Attorney General.*—I will first of all take what he proves as to Captain Bulloch, and afterwards what he shows as to Mr. Hamilton, and then what he proves as to Captain Tessier. Page 120 is the first place that I refer to now. Mr. Yonge states that he is a native of the State of Georgia, and was for some time paymaster on board the "Alabama." He says that he came from the port of Wilmington in North Carolina, in a ship called the "Annie Childs," to Liverpool, arriving at Liverpool on the 11th of March 1862. He is asked "In what employment had you been previously to leaving Wilmington?—I had been a

"clerk in the paymaster's office on the foreign station at Savannah in Georgia. Was Savannah a naval station?—Yes, it was at that time, it never had been previously to this war. At that time it was used as a naval station?—Yes. For what purpose?—For the Confederate forces. You tell us you were a clerk in the paymaster's department, did you know from your connection with the Confederate navy who at that time was acting as secretary to that navy?—S. A. Mallory, he was the secretary to the Confederate navy." Then he is asked whether he saw at Savannah, before he left, a person named Bulloch, and he says, "I did." "He came with me." That is to say Captain Bulloch came with this witness from Wilmington to Liverpool in the "Annie Childs."—"He came with me as far as Queenstown, and there he left the ship and went on land, but we came over together in the same vessel. Do you know from what you saw at Savannah whether Bulloch was in any capacity in the Confederate service?—I never saw Captain Bulloch's appointment, but I know that he acted for the Confederate Government. In the navy, the military, or what service?—In the navy. He acted in the Confederate navy?—In the Confederate navy. *Lord Chief Baron*.—Did he command a vessel?—No, he did not command any vessel. *The Attorney General*.—Did you act for a time as his secretary?—I did. And acting as his secretary, and communicating with him as your principal, do you know that he did act or not with reference to the Confederate navy?—I know that he acted, because I saw all the letters of the secretary of the navy to him and his replies to those letters. Was it a part of your business to make copies of those various communications?—I copied all his letters, there may have been a single letter which I did not copy." Then he says that he knows Mr. Mallory's signature to certain letters which I will not refer to now.

Then going to page 124, (I will resume this about Captain Bulloch,) the question is asked, "On your arrival at Liverpool, with whom, if with anyone, did you first communicate?"—The witness says, "Do you mean last year?" The Attorney General says, "I mean when you came to Liverpool from Wilmington, in the month of March 1862?—I was in communication all the time with Captain Bulloch."

*The Queen's Advocate*.—That is at the bottom of page 117, my Lord.

*Mr. Attorney General*.—"You came with Captain Bulloch?—I came with Captain Bulloch. And did you take counsel with him, and did he direct generally what you should do?—Yes, he did. Shortly after your arrival at Liverpool, did Captain Bulloch introduce you to any mercantile firm there?—Yes, to the firm of Fraser, Trenholm, and Company." Then the names of the partners are mentioned. "Did you communicate with the firm of Fraser, Trenholm, and Company?—I did." He mentions Mr. Armstrong, who is one of them.—"He was the principal person that I had any business with. You did see

Motion for Rule  
for New Trial.

Motion for Rule " Mr. Prioleau and Mr. Welsman?—Yes. As members of the  
for New Trial. " firm?—Yes."

Then at page 125, the next page, a little way down, after saying that he does not recollect seeing any flags, he is asked this—

*The Queen's Advocate.*—That is at the bottom of page 118.

*Mr. Attorney General.*—"You say you were introduced to those persons?"—(That is to the members of the firm of Fraser, Trenholm, and Company.) "Who introduced you?—I was introduced by Captain Bulloch. Did you see Captain Bulloch there from time to time at the office of Fraser, Trenholm, and Company?—I did." He is asked, "I thought you said (I want to be certain) that you yourself were there nearly every day?—Nearly every day. By the direction of Captain Bulloch?—Yes, I had to meet him there sometimes. Were these meetings between Captain Bulloch and yourself on matters of business? I will not at present ask what the business was, but I merely confine myself to the question, were your meetings upon matters of business?—They were frequently, that was not always the case. But principally?—They were principally on business. On the business on which you had come over?—Yes." Then he is asked, "Do you remember whether there was a room in the office or house of business of Fraser, Trenholm, and Company particularly used by Captain Bulloch?—There was a room used by them, the only room in which we wrote our letters and transacted our business generally. It was used, you say, by them?—By Captain Bulloch and by Major Hughes, a gentleman of the War Department. Then there was one room used particularly by Captain Bulloch for his business?—Yes." That was the room in which the witness transacted business with Captain Bulloch. Then he mentions that amongst others with whom he used to transact business there in the office was Major Hughes of the Confederate army, and then he mentions some other people, which I will not dwell upon. Then at page 130 he is asked this,—He mentions going out with certain other people on board the "Alabama" from Liverpool. I should mention that at page 129 he says that he remained at Liverpool from the 11th of March to the 29th of July 1862, and that he then left Liverpool in the "Alabama," which was then called the "Eurica." He says that it was the vessel built by Messrs. Laird. "When that vessel left she had no armament on board?—Nothing at all in the way of armament. While you were on her did she receive her armament, and hoist the Confederate flag, and pass to the command of Captain Semmes as a ship of war?—She did. All that you saw?—I saw it." Then he mentions one or two other officers who went with him in the "Alabama" and some who went in another vessel, the "Bahama," which met her at the rendezvous elsewhere.

*The Queen's Advocate.*—That is at page 123.

*Mr. Attorney General.*—"Captain Bulloch went out and re-  
 "turned in the 'Bahama'?—Yes," (to meet the "Alabama.") Motion for Rule  
for New Trial  
 "Leaving Captain Semmes and other officers in the 'Alabama'?  
 "—Yes. Before you left Liverpool in the 'Alabama' were  
 "you employed as paymaster?—I acted in that capacity. You  
 "acted as paymaster in the Confederate navy?—In the Con-  
 "federate navy. We will see what you did, you continued to  
 "act in that capacity for some time?—During the entire time I  
 "was in Liverpool I acted in that capacity. And you made  
 "payments in that capacity?—Yes, I continued to make pay-  
 "ments in that capacity." Then a paper is put into his hand  
 "which he proves to be signed by Captain Bulloch. "Look at  
 "that paper and tell me is that the signature of the gentleman  
 "you have described as Captain Bulloch?—That is it." He  
 "says that the appointment was made out, and then he says that  
 "payments were made. I will come to the payments presently.  
 "Now with regard to the paper,—the paper you will find in page  
 "11 of the appendix to the larger book,—it is not printed in the  
 "smaller book, and it is in these terms, "Liverpool, 30th July  
 "1862, addressed to Clarence R. Yonge, Acting-Assistant Pay-  
 "master, C.S.N.," (which I suppose means Confederate States'  
 "Navy). "Sir, by virtue of authority granted me by the Honour-  
 "able S. R. Mallory, Secretary of the Navy of the Confederate  
 "States, I hereby appoint you an acting-assistant paymaster.  
 "This appointment to date from the 21st day of December 1861.  
 "Very respectfully, Jas. D. Bulloch, Commander, C.S. Navy."  
 "My Lords, under that appointment he acted, and Messrs. Fraser,  
 "Trenholm, and Company made through him large payments on  
 "behalf of the Confederate States, to the different officers and  
 "persons who were to be paid. Going back to page 131, he gives  
 "an account of that: "This paper," he says at the bottom of page  
 "130, "was given to me on board the 'Alabama' the day she left  
 "Liverpool."

*The Queen's Advocate.*—That is at page 123.

*Mr. Attorney General.*—"You got it just as you were going  
 "away?—Just after we left, I think we were away at that time  
 "in Moelfra Bay." That is in Wales. "While you acted as  
 "paymaster in Liverpool, as I understand you, you had not any  
 "writing which authorized you to do so?—I had no writing.—  
 "But Captain Bulloch was there in Liverpool, who knew of the  
 "payments that you were making from time to time?—He did,  
 "that is the only writing in which my name appears as pay-  
 "master. You say you acted as paymaster?—Yes. You have  
 "told us in what way; although you had no writing, were there  
 "any directions or orders given to you to act in that capa-  
 "city?—There were. By whom?—By Captain Bulloch. But  
 "they were not written?—Not written." That is, while he was at  
 "Liverpool. "You made payments to various persons, were those  
 "persons in the Confederate Service to whom you made these  
 "payments?—I have made payments to the officers, I know the  
 "persons I made the payments to were in the Confederate navy.  
 "Who supplied the money?—I made requisitions to Captain

Motion for Rule  
for New Trial.

" Bulloch for the amount, and I received an order from him to  
" pay the monies either by cheque, or money itself. That was  
" the way in which you received the money?—Yes. How did  
" you get the money?—I was to make requisitions for the amount  
" I required at the end of each month. From Captain Bulloch?  
" —From Captain Bulloch. How did he pay you?—He would  
" give me an order on Messrs. Fraser, Trenholm, and Company.  
" You say, that the money was furnished by Messrs. Fraser,  
" Trenholm, and Company; on the occasions of the money being  
" furnished, have you delivered to them any order, or anything  
" of the kind?—I delivered Captain Bulloch's order." Then  
the orders being called for are produced by Messrs. Fraser,  
Trenholm, and Company, and your Lordships will find at page  
133 the form of them: " Liverpool, 1st May 1862, addressed,  
" Messrs. Fraser Trenholm and Co., signed James D. Bulloch.  
" Pay to the order of C. R. Yonge, Assistant Paymaster, on  
" account of officers' pay." Then there are several orders of  
various amounts, not inconsiderable in the whole.

My Lords, I think that Captain Bulloch's character is as well  
established by that evidence as anything in the world can be. At  
pages 134 and 135 there is a further examination of the same  
witness about the document which I have read to your Lordships  
appointing him paymaster; I do not think that I need read that,  
there are more payments connected with it.

Then Mr. Yonge also gives evidence concerning Mr. Hamilton,  
whose name I have mentioned to your Lordships. At pages 133  
and 134 of the small book he mentions the names of several  
officers in the Confederate service to whom, as paymaster under the  
appointment which I have read, he has paid various sums of money.

*The Queen's Advocate.*—That is at page 126.

*Mr. Attorney General.*—Amongst others he mentions Captain  
Bulloch and himself too, and then he mentions J. R. Hamilton;  
you will find elsewhere, I think, that the name is John Randolph  
Hamilton. He says, "I have paid (amongst others) Jno. R.  
" Hamilton money. You have paid officer's pay to them?—I have.  
" When you say you paid officer's pay to Hamilton, and to those  
" others, was the pay of officers in the army or in the navy? It  
" was the pay of officers in the navy. Altogether?—Altogether. I  
" suppose the payment varied according to the rank of the officer.  
" According to the rank. What pay in a rank did you make to Mr.  
" Hamilton?—As a lieutenant. A lieutenant in the navy?—The  
" pay of a lieutenant in the navy according to the length of time  
" they had been in the navy. I do not know whether you happen  
" to have known Mr. Hamilton before?—I did. As what?—As  
" lieutenant. In the Confederate navy?—Yes, in the Confederate  
" navy. Was that in a Confederate State?—In the Confederate  
" States." Then he is asked, "Do you happen to know when Mr.  
" Hamilton came to England," and he says, "I know within a  
" day or two from my own knowledge. Did he come before you  
" or after you?—He came some time after me. Did you leave Mr.  
" Hamilton in Liverpool when you went out with the 'Alabama'?  
" —I did." And he has not seen him since.



Then, with regard to Captain Tessier, at p. 138 of the evidence of the same witness, he speaks of the "Bahama" as coming out from Liverpool to meet the "Alabama," bringing guns and naval stores and munitions of war which were transhipped there, and the "Bahama," he says, was at that time under the command of Captain Tessier.

Motion for Rule  
for New Trial.

*The Queen's Advocate.*—That is at p. 130, at the bottom.

*Mr. Attorney General.*—Then he mentions what stores were received from the "Bahama" by the "Alabama," gun carriages and guns. Perhaps before I conclude with Mr. Yonge it would be right to mention the effect of the cross-examination. He was very ably cross-examined by one of my learned friends who was engaged at the trial,—Mr. Karslake,—who seemed to be very well informed of his history. It is quite evident, I think, that at one time or other there had been a perfect intimacy with the history of this gentleman, and it was brought out in cross-examination that he was certainly a man of morality by no means unimpeachable, that he had formed a connexion with a black woman who had passed as his wife, and whom he had deserted at Liverpool under circumstances which I cannot represent as creditable; that this black woman had a black boy, and that this lieutenant and paymaster in the Confederate service, "raised," as I think he described himself, in the State of Georgia, had suggested that a little money might be made of the black boy,—that he might be sold. My learned friend the Attorney General, in his reply, made some observations which the learned Chief Baron described as an attempt to whitewash Mr. C. R. Yonge. Far be it from me, and I think it was very far from the intention of the Attorney General, to whitewash any acts of that description. But what the Attorney General said, I take the liberty of repeating to your Lordships, namely, that all criticism, however disagreeable it might possibly be to Mr. C. R. Yonge, had no bearing whatever upon the evidence which I read to your Lordships, which was accredited by the *litera scripta* and the *res gestæ* by the documents presented by Messrs. Fraser, Trenholm, and Co. themselves, and Captain Bulloch, and against which there was no imputation. This was the whitewashing. It was no whitewashing at all, it was the simple truth. We in England are accustomed to liberty, we have no power of selling black man or white man, but this man came from a country where these things are common, where that practice exists, and you are not to suppose that a man bred up in the morality of slavery would look upon transactions of that kind as we do; and a man who is employed in such a service as that of burning and destroying all the merchants' ships that can be met with upon the wide ocean is of course not likely to be a man of very tender nature and one who shrinks very much from acts which we shrink from and ought to shrink from. There can be no doubt whatever that in the Confederate States he would have been a perfectly good witness, notwithstanding the selling of a black boy; we know that in those states they do not allow a black boy or a black man or woman to come into the witness box and

**Motion for Rule for New Trial.** tell his or her own story whatever may have been the evil done.

Therefore all that was mere clap trap; it had no bearing whatever upon the question whether these written documents did or did not prove that to prove which the witness was brought forward, namely, to prove the agency of Captain Bulloch for the Confederate States. The documents were the material things, nobody could discredit it, those documents which were produced by Messrs. Fraser, Trenholm, and Co. themselves, and therefore I say that for the sole purpose for which that witness was produced the clever cross-examination and the eloquent vituperation of my learned friend Sir Hugh Cairns was perfectly irrelevant; it was beside the mark, it did not tend to discredit the testimony upon the only point on which it was brought forward, because it did not rest upon the word of C. R. Yonge, it rested upon the acts of Captain Bulloch, upon the acts of Messrs. Fraser, Trenholm, and Co.,—the payments actually made by them to him in that capacity in which he swore that he acted and by Captain Bulloch's order—and therefore it was totally impossible for any jury or any judge who had the truth in view to be misled by any eloquent declamation from believing that those facts which the documents proved were the real facts in the case, and we wanted nothing from Mr. Yonge, except to prove the character and agency of Captain Bulloch. Exactly the same remark applies to another witness, against whom there was not quite so much to be said, namely, Mr. Chapman, who stated himself that he went under false colours into the office of Messrs. Fraser, Trenholm, and Co., affecting secession sympathies, whereas he had them not—I am very far indeed from justifying that, but the facts are just the same—the actings of Mr. Hamilton and the actings of Captain Bulloch, as to the “Alexandra.” Your Lordships will presently hear from the evidence we wanted to know their characters, and who and what they were, and I say it is utterly immaterial whether Mr. Chapman acted honourably or not, and whether or not Mr. Yonge is to be judged by the rules of English or Georgian morality, when he talks of selling a black boy. It is utterly impossible to doubt the evidence of those persons as to the character of Captain Bulloch and of the other persons when they were here.

Now what Mr. Chapman says is at page 113.

*The Queen's Advocate.*—This evidence is at page 107 of the larger book.

*Mr. Attorney General.*—My Lords, Mr. Chapman stated that he was of no occupation. He came to England about four months before his examination, and was at Liverpool, he says, about “two months ago.” “At that time had you business on which you wanted to see a person by the name of Captain Bulloch?—I wished to see Captain Bulloch.” He went to see him at the office of Messrs. Fraser, Trenholm, and Company. “Was Captain Bulloch a person you were acquainted with in America?—He was.” He went to that office to see Captain Bulloch about the first of April, and went there more than once. Upon the first occasion he saw one of the members of the firm, Mr.

Prioleau, and it was then he spoke as if he was a secessionist. He says he saw the Confederate flag, then he says that he was acquainted with Yonge in the United States and met his wife (that is this black woman who passed as his wife) in Liverpool, and she entrusted this witness with the letters, which letters were obtained from him, and which were the letters which were proved by Yonge to which I have referred. I pass over that and come to what he says at p. 115. He called again and saw Captain Bulloch and conferred with him upon the subject of those letters at Messrs. Fraser, Trenholm, and Co's. office a second time.

Motion for Bale  
for New Trial.

*The Queen's Advocate.*—That is at page 109, towards the end.

*Mr. Attorney General.*—Then with regard to Mr. Hamilton at the bottom of p. 117 he is asked this.

*The Queen's Advocate.*—It is page 111 of the other book.

*Mr. Attorney General.*—"Now, Mr. Chapman, while you were at that office, that is the office of Messrs. Fraser, Trenholm, and Company, with Captain Bulloch, did any one else come in?—Mr. Hamilton. Who was Mr. Hamilton, was he a person known to you before?—Yes, he was. What was he?—The son of General James Hamilton of South Carolina, formerly Governor of that State, and he was himself a lieutenant in the service of the United States until the year 1861." I think that that is sufficient, we have the account of his subsequent career from Mr. Yonge and we all know that that was the time at which South Carolina seceded from the United States, and when the secession began.

I think that I need not trouble your Lordships with more upon that matter. I now come to the acts and intervention of the different persons whom I have named, Captain Bulloch, Mr. Hamilton, Captain Tessier, and Mr. Welsman, one of the partners in the Firm of Fraser, Trenholm, and Company with regard to the "Alexandra." I think I have sufficiently proved that we qualified and gave a character to those persons, and established the undoubted fact that they were at Liverpool acting as the agents for the belligerent service of the Confederate States. Now the first witness that I will refer to is Acton, who is the watchman at Miller's yard, and whose evidence is at page 35 of the small book.

*The Queen's Advocate.*—And 32 of the large book.

*Mr. Attorney General.*—He is asked "Do you know a person of the name of Hamilton, a Mr. Hamilton?—I have seen him. Have you ever seen him in Messrs. Miller's yard?—I have. Have you ever seen him there during the course of the building of the vessel 'Alexandra'?—Yes. Have you seen him there more than once?—Yes. Frequently?—Yes. Can you tell at all how often?—Yes, once a week or twice a week. Did he take any notice of the 'Alexandra' (I do not ask you what) when he came into the yard?—Yes, a little. Did anybody come with him?—Yes. On those occasions?—Yes. Do you know the name of that gentleman?—Bulloch, I believe. Did they ever look at the 'Alexandra' together?—Yes. More than

**Motion for Rule for New Trial.** “once?—Yes.” He did not know of their giving any orders. “Did you ever hear Mr. Hamilton speak to Mr. Miller upon the subject of the ‘Alexandra.’ I do not ask what he said, but did you ever hear him?—Yes. Did you hear him do that more than once?—Yes, once at least. Did you ever hear this person of the name of Bulloch, that you have mentioned, speak to Mr. Miller?—Yes. Upon the subject of the ‘Alexandra’?—Yes.” We were met with all the objections that we could be as to evidence and were very cautious not to ask questions which we did not think we ought to press.

Then I will go to page 36, the next page before the cross-examination.

*The Queen's Advocate.*—It is 33 of the other book.

*Mr. Attorney General.*—“As to Mr. Bulloch and Mr. Hamilton when they came to the yard, how did they get in?—Through the yard gate. Who let them in?—Myself for one.”

*The Lord Chief Baron* says, “You mean they got in exactly like ‘other people’?—I suppose his Lordship meant people having business there. “Yes, just so.” *The Queen's Advocate.*—“Did they have an order or did they come in like anybody else?—They had an order from one of us. Was that the order usually given to everybody, or was it a particular order?—No.” I do not know exactly what that means. “What was it?—Generally an order for them to go through, that is all. Was it the usual or was it a particular order?—Not a particular order.” I suppose it means in the usual form. “*Lord Chief Baron.*—Had the order anything to do with the ‘Alexandra’?—Not that I am aware of. Was it merely to let them into the yard?—To come into the yard.” We find that they came once or twice a week, looked at the “Alexandra,” talked about her to Mr. Miller, and had a general order to be let in whenever they came, that I think is pretty strong. Then at page 37 of the same witness in his cross-examination he is asked about these people, and he seems puzzled when he is asked a question about Bulloch; he describes him as a little man.

*The Queen's Advocate.*—It is at page 35 of the larger book.

*Mr. Attorney General.*—“How do you know it was Mr. Hamilton who came?—I saw him. How do you know him?—I know him perfectly well. How do you know him?—I know him. Did you ever speak to him in your life?—Yes. What did you say to him?—I do not know.” Then in his re-examination at page 38 he is asked “Am I to understand that Mr. Bulloch never did, to you, give a name?” (it is quite clear that he was known by that name in the yard)—“No. Are you sure that he came with Mr. Hamilton?—I have seen him with Mr. Hamilton,” then he describes the sort of man that Bulloch was, “a little man with dark whiskers and beard.” I will now go to the evidence of Carter. We shall now find the activity of Mr. Hamilton in the workshop of Messrs. Fawcett, Preston, and Company,—Carter's evidence,—it is at page 46 of my book.

*The Queen's Advocate.*—It is page 43 I think of the other book. Motion for Bale  
for New Trial.

*Mr. Attorney General.*—"While the machinery was being prepared" (he identifies it as the machinery intended for No. 2,209, which was the number of the "Alexandra,") "were you frequently at work in your business of a carpenter in the erecting shop?—Sometimes. Is that the shop where the machinery is prepared and fitted for the vessel?—Yes. While you were there did you ever see a gentleman of the name of Hamilton?—Yes. I have seen him there. Did you see him there frequently or seldom?—I have seen him there pretty often. When he was there did you see whether he paid attention, or did not pay attention to the machinery?—I could not say that he did particularly to any branch of it, I could not see that he did to that branch of the machinery more than to another." Then the same witness at page 48 of my book is asked this, "Have you seen from time to time Mr. Hamilton with Mr. Sillem in the shop?"

*The Queen's Advocate.*—It is at page 45 of the larger book, the top of the page.

*Mr. Attorney General.*—He had been speaking just before of the guns and gun carriages which were mentioned to your Lordships. "Have you seen from time to time Mr. Hamilton with Mr. Sillem in the shop?—Yes. I mean at this time when the machinery and the guns were in preparation?—Yes. Have you at any time or times heard Mr. Sillem speak of alterations?"—Mr. Sillem, I think I told your Lordships, is a partner in the firm of Fawcett, Preston, and Company. "Have you at any time or times heard Mr. Sillem speak of alterations either in the screws of the gun carriages or other matters connected with the guns in Mr. Hamilton's presence?—I have heard him make the remark that he could make improvements in the compressor screws. You have heard Mr. Sillem say that to Mr. Hamilton?—Yes. That he could make improvements in the compressor screws?—That he had done so. What did Mr. Hamilton say upon that?—He thought it was a great improvement upon the old original one. He said that?—Yes. *Lord Chief Baron.*—In the lock?—No, the compressor screws." Then there is the evidence of Hodgson at page 55, he was also in Messrs. Fawcett, Preston, and Company's service; it begins at the bottom of page 54 in my book; he is the packer. "Do you know a person of the name of Hamilton?—Yes. Did you ever see him there?—Yes."

*The Queen's Advocate.*—It is at the bottom of page 51 of the other book.

*Mr. Attorney General.*—"Whom was he with?—Sometimes alone, and sometimes with Mr. Sillem, and sometimes with Mr. Mann," (Mr. Mann is another member of Messrs. Fawcett and Company's firm) "but he was more often with Mr. Mann." We asked what he came about, and Sir Hugh Cairns interrupted by saying "That is not the proper question; what did he say or do?"

**Motion for Rule  
for New Trial.**

Then I asked, "Do you recollect anything he said in their presence in the packing room?—No. Do you remember anything he ever did in their presence?—No, except examining the shot and shell. Did he talk to them about it?—Mr. Sillem and Mr. Hamilton were talking about it, I could not understand what they said. Have you ever seen Mr. Hamilton at Miller's yard?—I met him coming along the yard. Do you recollect anything Mr. Sillem ever said to Mr. Hamilton? When he spoke to him what did he call him?—I never heard him say anything. Do you recollect anything being said about the clench rings that were being made for this ship, did Mr. Hamilton speak to any of the partners or to Mr. Speers?" The answer is, "Mr. Hamilton has been down to Fawcett, Preston, and Company's premises, and as soon as he has gone away there has been an order to get these things ready." *Sir Hugh Cairns* says, "Listen to the question; did you ever hear Mr. Hamilton say anything to the partners on the subject of the clenches?—No. *The Solicitor General*.—Were any orders given after Mr. Hamilton came to the yard concerning these clenches?—Yes. *The Lord Chief Baron*.—By whom? *The Solicitor General*.—By any one of the partners?—Yes, to get these up to the boat; they were in a very great hurry for these clenches and bolts at that time. Do you recollect when these orders were given? *Sir Hugh Cairns*.—Was this by Sillem or by whom? the manager. Mr. Speers?—Yes. *The Solicitor General*.—Do you recollect in what terms the orders were given?—To see for bolts and clenches and take what was ready to the yard at once. Were those orders given immediately after a visit from Hamilton?—Yes, on one or two occasions. As soon as he had gone?—Yes. Did you take the clenches and bolts yourself?—Yes, I did. In consequence of that order?—I suppose so." So that we have seen him with Captain Bulloch twice a week in the yard looking at the ship. He is seen in the yard by this witness, he comes and looks at the machinery as well as the guns and the shot and the shell, and then he talks to the partner in the presence of the witness; he does not hear what is said, and then immediately after his going, more than once orders are given in a great hurry to take to the ship some of these articles necessary for fitting them out.

At page 59 there is one other passage in the evidence of this Mr. Hodgson. He identifies by their number all the machinery, clenches, and bolts made for the "Alexandra" by the number 2,209. "Did you ever see Mr. Hamilton inspecting that machinery while it was being made?"

*The Queen's Advocate*.—That is at page 56.

*Mr. Attorney General*.—"Did you ever see Mr. Hamilton inspecting that machinery while it was being made?—Yes, I have seen him inspecting it." Then Robinson is examined at page 43.

*The Queen's Advocate*.—That is at page 40 in the large book.

*Mr. Attorney General*.—Robinson was a joiner, and he was in

Fawcett and Company's shop making the gun carriages. He is asked, "While you were so employed did Mr. Hamilton come to the premises?—I have seen him at times, several gentlemen. I was just asking at present about Mr. Hamilton; did he come in company with anybody else, will you tell me?—I have seen a gentleman called Mr. Hamilton. Did he come there while you were making these gun carriages?—Yes. Did he inspect the making of the gun carriages?—Merely looking at them." That just confirms it and goes to the same point.

Motion for Rule  
for New Trial.

My Lords, I now come to the evidence of a person named Da Costa; perhaps, before I read it I may mention a circumstance slight in itself, but assisting in the connection of these facts, namely, that the witness Hodgson at page 60 speaks of very frequent communication at this time by notes and letters between the two firms of Fawcett, Preston, and Co. and Fraser, Trenholm, and Company.

*The Queen's Advocate.*—It is at page 56 of the larger book.

*Mr. Attorney General.*—His evidence is this, "At that time were you sent to carry letters?—Yes. To what firms?—To firms all over Liverpool. Among others did you carry any from Fawcett and Co. to a firm named Fraser, Trenholm, and Co.?—Several. Was the communication frequent between those two firms?—Yes. And you often had to carry those letters?—Yes, very often."

I now come to the evidence of Da Costa, and first of all, I will give your Lordships what Da Costa states as to the interference in his presence of Welsman, a partner in the firm of Fraser, Trenholm, and Company, and Captain Tessier with regard to the ship. They are single acts, but acts which could only be referred to an interest which they had in her, or a control and authority which they had over her. The first is at page 94 of my copy.

*The Queen's Advocate.*—It is at page 91 of ours.

*Mr. Attorney General.*—This gentleman, Mr. Da Costa, is a partner in a steam tug and a shipping agent. My learned friends represented him by a less complimentary word; they called him a crimp, but I may say that I never saw a better witness in the box. He appeared to me to be a very straightforward, honest, and consistent witness, and was not shaken the least in the world by cross-examination on any point. It is easy to call a man names. He seems to be perfectly respectable, and the firm of Miller and Sons had been building for the company in which he was concerned a ship or tug called the "Emperor," which was launched and had a trial trip; and that is what brought him into communication with them and about their yard. He says this at page 94 of my book.

*The Queen's Advocate.*—It is at page 90 of the other book.

*Mr. Attorney General.*—He is asked, "Do you know Mr. Welsman and Captain Tessier?—I know Captain Tessier quite well, Mr. Welsman only slightly. Do you know him by sight, Mr. Welsman, I mean?—Yes. Did you ever see Mr. Welsman in Mr. Miller's yard during the time when the 'Alexandra' was building?—I did. *Lord Chief Baron.*—Did you see Captain

**Motion for Rule  
for New Trial.**

"Tessier" (there was some observation which intercepted the answer). "Is Mr. Welsman a member of the firm of Fraser, Trenholm, and Company?—He is. They are merchants at Liverpool, I believe?—Yes. Did you see him there more than once?—Yes. Did he do anything when he was there?—I saw him giving orders for one of the men to work at this boat. That is the 'Alexandra' you mean?—Yes. Did you see him doing that more than once?—The order, that was only once. Did you see him doing anything else besides giving orders?—He was always inspecting round about. Always inspecting, do you say?—When I saw him." That is very clear and direct evidence, except there be anything to discredit it, of the interference of Welsman by giving orders as a person having an interest. Then the witness is asked, "Do you know Captain Tessier, I think you said you did?—Quite well. Have you seen them during the time the 'Alexandra' was being built?—Yes. More than once?—Yes. Have you seen him there frequently?—Yes. Have you heard him give any orders respecting the gun boat?" (this witness had throughout called the 'Alexandra' the gun boat).—"I did not hear him give any orders. Have you seen him do anything?—He was always about her superintending." Then I pass over one or two questions. At page 103, I think, he speaks of a particular act done by Captain Tessier. There is a discussion. He is asked as to something which was said by Captain Tessier to Mr. Miller the elder, who was the undoubted owner of the works. There was a little discussion about the evidence which I pass over. The Lord Chief Baron held that he must admit the evidence, and then the question at page 103 is "Tell us what he said with reference to the construction of the 'Alexandra.'" This was to Mr. Miller. "He wanted" (that is Tessier wanted) "the combings of the hatch higher. That is what he said?—Yes."

*The Queen's Advocate.*—It is at page 98 of the larger book, my Lord.

*Mr. Attorney General.*—"Did he say how much higher he wanted them?—Three inches, I think it was. Of what hatch?—The main hatch. Did Mr. Miller, senior, make any answer?—He did. What did he say?—He said he would not do it; it was according to contract." That meant, as I understand, that what was done was according to contract. So that Captain Tessier was constantly there inspecting like these other people. Then he expressed his wish that a particular change should be made, to which Mr. Miller objected, that what had been done was according to the contract.

Now the same witness, Da Costa, gave evidence as to the more direct statement made to him by Miller, while the ship was in his possession and in progress, as to the intent and the purpose. There was a long discussion about the admission of that evidence, it was eventually admitted upon consideration and was before the jury. At pages 92 to 94 of my book there is that part of the evidence. He is asked at the top of page 92, "Do you remember



"a short time before the 'Emperor' was launched having a conversation with Mr. Miller, senior?—Yes." The "Emperor" was the ship or tug which Mr. Miller was building at that time for the company of which this witness was a partner. "When was the 'Emperor' launched?—On the 8th day of January 1863. You say you remember having a conversation with him, and now I ask you what that conversation was? *Sir Hugh Cairns.*—Do not answer. My Lord, that would be a question to which we object, and your Lordship perhaps will be good enough to take a note of it. *The Queen's Advocate.*—Perhaps I had better put it. Had he a conversation with you about the 'Alexandra'?—Several times. Now, then, I will ask you further. You had a conversation about the 'Alexandra'?—Yes. Did he in the course of that conversation say anything to you as to what the 'Alexandra' was intended for?—On three different occasions."—Sir Hugh Cairns objects to the question and the Queen's Advocate says, "Now answer my question. Did he in the course of that conversation tell you what she was intended for?—He did. What did he say?—He told me she was a gunboat for the Southern Confederacy." *The Queen's Advocate.*—This is at pages 87 and 88 of the larger book.

*Mr. Attorney General.*—"Did he say anything to you at that time about a contract for the 'Alexandra'?—He did, my Lord, must I give you the exact words that passed? *Lord Chief Baron.*—Give us the best of your recollection of what passed. *The Queen's Advocate.*—The question is, Did he say anything to you then about a contract for the 'Alexandra'?—He said 'We' (that is Millers) 'conjointly with Messrs. Fawcett, Preston, and Company, are building this vessel for Messrs. Fraser, Trenholm, and Company.' Did he say for whom?—They were the agents for the Southern Confederacy." Mr. Miller had a conversation with this witness on three different occasions as to what the "Alexandra" was intended for. "He told me that she was a gunboat for the Southern Confederacy." "He said, 'We conjointly with Messrs. Fawcett, Preston, and Company, are building this vessel for Messrs. Fraser, Trenholm, and Company.' "Did he say for whom?—They were the agents for the Southern Confederacy. *Sir Hugh Cairns.*—Did he say that?—Those are the words he said. *The Queen's Advocate.*—What did he say?—They were the agents; in the conversation which took place, he several times said so. In the conversation that took place he said several times that they were the agents for whom?—For the Southern Confederacy. Had you any other conversations with him about the 'Alexandra,' and for whom she was intended?—Yes, certainly. What did he say at those other times?—It was the same sort of thing. *Lord Chief Baron.*—It was to the same effect?—Yes."

Then a little later he speaks of a conversation at another time, at the bottom of page 93, about certain blocks to lay the keel of a gunboat early in the time of the construction of this ship, when

**Motion for Rule  
for New Trial.**

I suppose she was first being laid down. He is asked, "Did you afterwards see any vessel upon those blocks which he pointed to?—Yes. What vessel?—The 'Alexandra' that is now. Do you remember having a conversation with Mr. Miller upon the subject of the 'Alexandra' in November 1862?—I do. Do you remember whether he said anything about the name of the vessel on that occasion in November 1862?—He did. What did he say?—'Alexandra.' Tell me what he said?—He said that the vessel, the gunboat, was to be called the 'Alexandra.' Did you ask him any question why she was to be called the 'Alexandra'?—I did. What was the question?—I asked him was that the name of some state or city, and he said it was. Did he say where it was?—He said it was in the Southern States; I think that was the word. Did he say anything about its agreeing with any other name?—He said it was in unison with the 'Alabama' and the 'Florida.'" Then a little while after he is asked "Do you remember at any time his saying anything to you about a gun in connection with the 'Alexandra,' or guns?—Nothing; only gunboat, that is all."

My Lords, I have said, and I repeat it, that in the cross-examination of this witness nothing was elicited from him, which either in word or in manner shook his credit the least in the world. The evidence was given in a manner perfectly open and straightforward, and I say that he is a witness who is not discredited in any way whatever, but he is accredited by the facts, by the superintendence and the interference of these persons. The orders given by Welsman, of the firm Fraser, Trenholm, and Company, exactly consistent with the proposition that Millers are building this vessel conjointly with Fawcett, Preston, and Company, under a contract with them as agents for the Confederate States. The superintendence proved of Hamilton and Bulloch, who are the proved agents of the Confederate States, and the ship being called a gunboat by Fawcett and Company themselves.

Now, my Lords, I do submit that upon that uncontradicted state of evidence, no evidence whatever being produced upon the other side; the jury, unless it were to be explained as it is to be explained by the manner in which they were directed in point of law, would have wholly miscarried in not finding a verdict for the Crown, and I do not submit that it is against evidence. Of course, in order to prove that I must go to the other branch of the question, namely, the law to which that evidence is to be applied. But if I am right in my view of the law, I take it to be quite plain that upon that uncontradicted evidence it is proved that the ship which was being built and constructed to be used as a gunboat was in course of equipment, furnishing, and fitting out. That all the people named for that purpose in the information were aiding and abetting, or attempting and endeavouring to equip, furnish, and fit her out, to the intent and for the purpose that she should be employed by those who ordered her, by those for whom she was being built, namely, the Confederate States. My Lords, the

explanation of the verdict which was given will be perfectly plain to your Lordships when I come to read the summing up of the learned Chief Baron. If I had been in the jury box, if any one of your Lordships had been in the jury box, owing the duty which a jury does to the judge, who instructs them in the law, I should have instantly felt that there was no question left for me, that my opinion was not asked, that I was told to withdraw my mind from the consideration of the incidence of this evidence as to the intent, the service, or the purpose for which the vessel was being fitted up; I was told that she was not being fitted up at all, that she was not being equipped at all, that she was not being furnished at all, and that nobody was attempting to equip or furnish or fit her out according to the Act, and that therefore the question of fact did not arise. That was the manner in which the jury were directed, and the jury had no option under such a direction but to find the verdict which they did find. But I say that if the jury had been properly directed, the evidence which I have read, met by no counter evidence, was evidence upon which the Crown were clearly entitled to a verdict, and that the verdict which has been given in the face of such evidence is a verdict which ought not to stand.

Motion for Rule  
for New Trial.

My Lords, I am fully aware that I must address myself to the Act of Parliament to show that I am right in my view of the effect of the evidence in connexion with that Act. My Lords, the Act of Parliament must be looked at in its entirety; we must look not only at the particular clause, but at the other parts of the Act which can throw light upon the object and purpose of the Legislature in passing it; and, in that point of view, it is not at all unimportant to attend both to the preamble and other clauses, which, relating as they do to a different offence, yet illustrate the general object and policy for which this Act was passed. And, I say, the general object and policy of the Act was to enable the Crown, with regard to the particular subjects which are mentioned in it, to enforce within the territories of the Crown as against the subjects of the Crown that neutrality which it professed as to Government, that there are many things as to which Governments do not attempt by law to enforce upon their subjects the neutrality which they themselves profess, but that there are other things as to which, for the peace of the kingdom and for the honour of the nation, it is important to provide against such infractions of neutrality by subjects within the realm, or by foreign belligerent Governments using the agency of its subjects within the realm, as, if permitted to go on and to grow to a large scale, will have the inevitable tendency, whatever may be the technical rules laid down by writers upon international law, to involve nations in war with each other, and to damage and discredit the good faith of the country whose Government, professing neutrality, permits its shores and its ports to be used as arsenals for other belligerent countries which have none of their own, in order that war may be carried on practically, direct from those ports, upon the high seas against

Motion for Rule  
for New Trial.

other nations. And therefore this Act strikes at two classes of things always contraband, and always in that sense against the law of nations, so that it may visit them with such punishment as the belligerent suffering from them would have it in his own power to inflict, but neither of which, until the passing of this Act, was considered to be against international law in this sense, that the Government permitting them was to be held guilty of a breach of that law because it did not restrain them, yet it was found impossible to maintain really friendly and neutral relations, and to secure the majesty and the dignity of the British Crown from being violated and insulted by the acts of foreign belligerent Governments, violating its own neutrality by the agency of its own subjects, unless these things were prevented; it was therefore thought necessary to take out of the general category of contraband dealings the particular class of dealings contained in this Act, and to say the law of this country will not permit them. What are those two classes?—The enlistment of men and the equipping, furnishing, or fitting out of ships.

Now, before this Act of Parliament was passed, or rather before the Acts were passed which preceded it of the same kind, the general law of nations no more threw upon the Government of a particular country the obligation to prohibit or to prevent the enlistment of its men in a foreign belligerent service than it did the obligation to prohibit the equipment of ships within its ports. It was always a thing which was done, and we know that it was done upon a great scale, if we travel out of the right field of legal argument into other sources of information. We know from great authorities what was done in the time of Queen Elizabeth, and on the continent of Europe, and that there was a protest for the first time against the right which it was supposed any subject would have to take service wherever he pleased. But this Act is directed against those things I have already mentioned, and that to some extent as to the enlistment of the men; it had been preceded by similar Acts, and it may be in your Lordships' recollection that those similar Acts were found defective in this respect, that they did not deal with any case but the case of service taken under a recognized Government, whereas at the time when this Act was passed the war in which this country stood neutral was between the insurgent provinces of Spain in South America and the mother country, those insurgent provinces not having acquired the status of a recognized Government, and therefore not being hit by the precise words of the older Foreign Enlistment Act, which related to men alone. In that state of things this Act is passed "to prevent the enlisting or engagement" of His Majesty's subjects to serve in a foreign service, and the "fitting out or equipping in His Majesty's dominions vessels for" warlike purposes, without His Majesty's licence." That is the title which, as his Lordship observed at the trial, does not legally enter into the interpretation of the Act. The preamble is this, "Whereas the enlistment or engagement of His Majesty's subjects to serve in war in foreign service, without His Majesty's

“ licence, and the fitting out and equipping and arming of vessels  
 “ by His Majesty’s subjects, without His Majesty’s licence, for  
 “ warlike operations in or against the dominions or territories of  
 “ any foreign prince, state, potentate, or persons exercising or  
 “ assuming to exercise the powers of government in or over any  
 “ foreign country, colony, province, or part of any province, or  
 “ against the ships, goods, or merchandize of any foreign prince,  
 “ state, potentate, or persons as aforesaid, or their subjects, may  
 “ be prejudicial to and tend to endanger the peace and welfare  
 “ of this kingdom.” My Lords, the disjunctive word “ or ” which  
 we find in the seventh clause does not occur in that preamble, but  
 I think it is perfectly manifest that the “ and ” has exactly the same  
 force there as if it were a disjunctive word, that is to say, that each  
 of these things, if not prevented, will be prejudicial to and will tend  
 to endanger the peace and welfare of the kingdom,—first, the  
 enlistment or engagement of the subjects to serve in war in  
 foreign service; 2ndly, the fitting out of vessels; 3rdly, the  
 equipping of vessels; and 4thly, the arming of vessels. The  
 conjunctive instead of the disjunctive form in the preamble is  
 exactly appropriate, because all those things and every one of  
 them is within the mischief which the statute is intended to pre-  
 vent. When we come to the 7th clause, the object being to strike  
 every one of them *separatim*, the conjunctive is turned into the  
 disjunctive.

Motion for Rule  
 for New Trial.

*Mr. Baron Bramwell.*—Clearly that is so; otherwise you must  
 make the whole conjunctive, and then it would read that no  
 offence would be committed unless you at the same time enlisted  
 and fitted out a vessel, which cannot, of course, be.

*Mr. Attorney General.*—It cannot possibly be.

*Lord Chief Baron.*—All those four matters, fitting out, equip-  
 ping, and so on, are, I think, to be prevented disjunctively, and  
 unless I had so thought I ought to have stopped the prosecution  
 at once, because there was not a count in the indictment which  
 complained of either arming or attempting to arm.

*Mr. Attorney General.*—If we took it that all the words meant  
 the same thing, of course any one word would answer the same  
 purpose. In the preamble, however, the disjunctive “ or ” is made  
 into a conjunctive, and I will show that each of the things is  
 within the mischief, and therefore all are mentioned.

*Mr. Baron Bramwell.*—One is and the other is.

*Mr. Attorney General.*—Yes, my Lord. Then I beg your Lord-  
 ships’ attention to what is the mischief. The mischief is obviously  
 what is expressed, namely, that this “ may be prejudicial to and  
 “ tend to endanger the peace and welfare of this kingdom.” I am  
 sure that when my Lord comes to be reminded of a passage in  
 his summing up, in which that view was stated, which, under the  
 influence of the powerful arguments which he had heard, he at  
 that time held to be the right one, of the object of the statute,  
 he will not recognize his own words as expressing the meaning  
 which he said he had intended to enunciate, so different is it from  
 the language which we find in the statute. His Lordship, ac

**Motion for Rule for New Trial.** according to the natural meaning of the words, says that the object of the statute is only to prevent collisions.

*Lord Chief Baron.*—My impression was that the object of the statute was to prevent any hostile vessel being fitted out and equipped, so as to make a port of this country the port of discharge, the commencement of a hostile operation.

*Mr. Attorney General.*—I knew that your Lordship would not adhere to what I find in the short-hand writers' notes upon that subject, because what fell from your Lordship was this, that the mischief apprehended was, that there might be building in Messrs. Miller's yard a ship for the Confederates, and in Messrs. Laird's yard another for the Federals, and that on coming out they might come into collision one with the other, and produce hostility upon our waters.

*Lord Chief Baron.*—There can be no doubt that that was one of the mischiefs which were intended to be guarded against.

*Mr. Attorney General.*—I take the liberty of saying to your Lordship that I do not think that such a thing ever entered into the mind of any human being, because, so far as I am aware, it never happened before. It would not be the object of either party to get into war with this country; they would take care not to violate one of the commonest rules of international law, namely, to get outside neutral waters before commencing hostilities.

*Lord Chief Baron.*—I think you will find in Kent's Commentaries something to the effect which I have stated.

*Mr. Attorney General.*—No; nothing of the kind, I assure your Lordship.

*Mr. Baron Pigott.*—I think I have read something to the same effect in some other writer, that it may lead to those consequences.

*Lord Chief Baron.*—And the fact in point of history has taken place.

*Mr. Attorney General.*—I do not say that it is impossible.

*Lord Chief Baron.*—It is not only not impossible, but it is a fact.

*Mr. Baron Pigott.*—Was not it nearly happening in the very case of the Confederate and the Federal vessels in this country? Did not we stop the one at Southampton in order that the other might have a run?

*Mr. Attorney General.*—What might possibly happen would be that the one might follow the other if not prevented.

*Mr. Baron Pigott.*—Did not we do that for fear they should come into collision within British waters?

*Mr. Attorney General.*—They would not come into collision within British waters; one might have followed the other out of port, and for that reason a special order was made by Her Majesty in Council. That of course has nothing to do with the Foreign Enlistment Act. All I can say is this, that without saying that such a thing is not theoretically possible, yet to state that that is the object and policy of this statute as declared upon the face of it, would, I think, be taking a liberty with the law which it does not belong to any Court to do. It is plain that the object was to preserve the neutrality of this country, and to enforce it

against the subjects of this country, in matters in which the neglect of it by those subjects, or the violation of it here by foreign belligerent Governments, was thought calculated to lead to a position as regards foreign nations which would endanger the peace and welfare of the kingdom. How would it endanger the peace and welfare of the kingdom? Manifestly by involving us in war, by making us practically so far parties through our subjects to belligerent operations if we allowed this country to be made the base of those operations, either for the enlistment of men or for the equipping of vessels of war, as to make it probable that other countries would not endure it, but resent it, and that so we might become involved in war. That is the mischief which the statute is manifestly intended to protect us against.

Motion for Rule  
for New Trial.

Then the second clause, as to enlistment, your Lordships will find is one which prohibits any natural-born subject of the Crown anywhere, I think, from enlisting or entering himself or serving "in and on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out or equipped or intended to be used for any warlike purpose in the service of, for, or under or in aid of any foreign power." It is quite manifest that, under that, the mere taking an engagement on board a vessel of any sort or description used or intended to be used for any warlike purpose is equally struck at as taking an engagement on board a vessel which is of a particular class.

Then I pass over the penalties affixed to taking service in that way by the enlistment clauses, and the mode in which those penalties are to be proceeded for, and I come to the 7th clause. It is quite manifest that the enlistment of men in this country to serve in and on board any ship used for the warlike purposes of a foreign nation could not have any other tendency to involve this country in war than by leading to a breach of friendly relations with the country who suffered by that sort of enlistment. The 7th section, with which we are dealing, is, I should have thought, though rather involved and intricate in its language, most carefully expressed, so as to include every species of case which can come within the mischief, and not to enable any one to escape from the case being brought within the mischief which is sought to be prevented or the intent which is prohibited. The words are these, "If any person in any part of His Majesty's dominions shall, without the leave and licence of His Majesty for that purpose first had and obtained, as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm." Now, first stopping at the words "any person," it is quite obvious that it may or not be a subject of the crown. When the enlistment was spoken of only natural-born subjects were prohibited from enlisting. When the procuring persons to enlist was spoken of, any person within His Majesty's dominions was prohibited from doing so, and here we have any person, whether a natural-born subject, or, like Captain Bulloch and Mr. Hamilton, a foreigner, and, *à fortiori*, the British Government acting by its agents, they would be the persons of all others whom the act

Motion for Rule  
for New Trial.

would intend to prohibit, because they are directly violating our neutrality by using our shores and our ports for such a purpose. The statute provides against any person doing any one of these things, it being in the disjunctive, it distinguishes them, and seems to be carefully worded in order to avoid the chicanery which would result from requiring some particular species of furnishing, some particular species of fitting out, some particular species of equipment, in order to make the act penal in a case in which the attempt is proved. I say that the whole gist there, is the intent and the purpose, and that any species whatever of equipment, however innocent, *per se*, any species whatever of furnishing, any species whatever of fitting out, whether with or without arming, is struck at by the Act, by its plain words, according to their natural meaning, and are necessary, and that, I apprehend, is their object and policy, provided always that the intent and purpose is established. Now what are the words? "Equip, furnish, fit out, or arm." If it had stopped there of course it would not have had the effect of prevention. The statute of course aims at prevention, not at punishment when the thing is done. The statute desires to stop the thing *in limine*, to cause the thing not to be done, and therefore, instead of stopping at these words, it goes on "or attempt or endeavour" to do any one of these things, so that, however little progress may have been made, and in whatever imperfect condition the ship may be as to these things when she is seized, if any step has been taken which is an attempt or endeavour it is sufficient; any attempt or any endeavour to do any one of these things, provided it be a prohibited attempt, is struck at, and not only the attempt or endeavour but any one who "shall knowingly aid, assist, or be concerned in" the equipping, furnishing, fitting out, or arming." Now that is a clause which is remarkable, because it strikes at the case of a person within Her Majesty's dominions, knowingly aiding, assisting, or being concerned in the equipment, whether or not the equipment takes place *quoad alios* elsewhere. Any person who does any one of these things within Her Majesty's dominions offends against the Act, that is to say, any one who equips, who attempts or endeavours to equip, who procures to be equipped, or who knowingly aids, assists, or is concerned in the equipping, wherever the equipment is completed, and whoever be the person by whom it is made. Then what is the intent? "With intent" or in order that such ship or vessel shall be employed," not by any particular person, but "shall be employed in the service of" any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people as a transport or storeship," in which case of course it would not have arms at all, its equipments would be of another character; "or with intent to cruize, or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate," and so on.



My Lords, I look in vain in that clause for any warrant whatever for some distinctions which have been arbitrarily imported into it by some persons who seem to think that this clause makes exceptions in favour of shipbuilders, and in favour of mercantile dealings and objects, and that if they take money for the prohibited thing, if they enter into a contract with a person to do it and are paid, it takes them out of the scope of the statute, although they attempt or endeavour, or knowingly aid, assist, or are concerned in the equipment. The statute makes no such distinction. The statute strikes every person, a shipbuilder or an engineer, like Messrs. Fawcett, Preston, and Co., as much as anybody else; it strikes a person whether he does it under a contract or whether he does it without a contract, whether he does it for money or whether he does not do it for money, provided he does the prohibited thing, and that prohibited thing is either equipping, or attempting or endeavouring to equip, or knowingly aiding, assisting, or being concerned in the equipping, with a certain intent. The intent is the gist of the whole thing, and that is the thing to be proved.

Motion for Rule  
for New Trial.

Now I observe here, what I shall have occasion to show more completely hereafter, how very great is the fallacy into which it is possible to fall when dealing, without due attention to the language of the statute, with distinctions rightly laid down, in some cases as to mercantile adventures in ships of war which are not prohibited, of course there may be a mercantile adventure which is not prohibited, but it must be a mercantile adventure as to which the thing is not done with a prohibited intent of course, in order that there should be the intent that the vessel shall be so employed there must be some person party to the business who is capable of having such an intent; and who is it? For example, if a shipbuilder in England builds on speculation on his own account a ship, intending to take it to any port in the world where he can find a market for it, it is obvious that he has not within Her Majesty's dominions any intent to employ or any power to employ the ship in the service of any belligerent power; all his intent is to sell the ship to a purchaser somewhere or other, or it may be in some particular place, if he can find one there, and nobody but himself has any control over it at the time. Nobody but himself has anything to do with it at the time, nobody but himself, under the circumstances, can determine the intent, and as he does not mean to make war in it himself, or does not intend that any one else shall make war in it, that is not struck at by the statute. But wherever you have parties concerned in the equipping or fitting out or furnishing, or the attempting or endeavouring to do any of these things, either as shipbuilders or as engineers, aiding in any way whatever in any of them, where there is a principal in the matter who has the intent and is master of the employment, can there be any doubt whatever that it is struck at by the statute? For instance, suppose they constructed the vessel meaning themselves to use their own ship as a privateer. That is what was put by my learned friend Sir H. Cairns in his argument at the trial, as if

Motion for Rule  
for New Trial.

that was the only thing which the statute meant. That covers fitting out, because a man who is building and fitting out a ship has it in his power to make a particular thing of her. But supposing he is building her under a contract, supposing the ship is ordered by the belligerent Government itself (and that is the case to which this evidence points), can any one possibly say that this statute does not strike at the case in which a belligerent Government gives an order to a merchant in Liverpool to equip a vessel for them and to take her to sea as a ship of war of theirs? And the merchant at Liverpool knowing fully that that is the purpose for which the ship is employed, which the very character of the employment proves, is not the merchant as much guilty, is not the shipbuilder as much guilty, is not the engineer as much guilty as the agents of the Confederate Government who are violating the neutrality of the country in the first instance?

Now all this was totally lost sight of at the trial, nay, doctrines entirely inconsistent with it were laid down, and I say that unless your Lordships are to make law instead of interpreting it, unless you are to deviate from the plain language of this statute and the natural meaning of its words for the sake of destroying its effect, for the sake of preventing it from checking and suppressing the mischief, you must say that any species of furnishing, any species of equipment, any species of fitting out, with or without arms, provided it be done with this intent, which I agree must be a fixed intent of a person capable of having the intent and assisting in that intent formed within this country, if you have that intent proved (and you have evidence to prove it here) this is a case which the statute strikes at, and you may as well drop the whole Act out of the Statute book if it does not.

*Mr. Baron Bramwell.*—Just let me tell you a difficulty which has occurred to me with reference to this Act of Parliament, not at the present moment, of course. The words are, “equip, furnish, fit out, or arm with intent that such vessel shall be employed as a transport or store ship, or with intent to cruise or commit hostilities.” The equipping therefore must be either as a transport or store ship or with the intent to cruise or commit hostilities. So also must be the furnishing, fitting out, or arming. It may be said that in this case there was no reasonable evidence upon which the jury could find that this vessel was equipped as a transport or store ship, therefore you may leave those words out. Then it may be said that there was no equipment of her of such a kind that she could cruise or commit hostilities, and that therefore that part of the intent fails to be made out. Now I understand that to be a difficulty which has been felt in the construction of this Act of Parliament, and I throw it out for your consideration if it has escaped you.

*Mr. Attorney General.*—I am very much obliged to your Lordship. It has not escaped me, but my answer is this, that the Act is intended to prevent and not to punish; steps which are being taken to that end are steps which, if taken with that intent, are as much against the Act as the completion of those steps would be.

It is perfectly plain that the ship was meant to be completed in some way or other; she was in course of equipping; she was in course of furnishing; she was in course of fitting out, and if the evidence was such as to show that her object and purpose was to be employed as a war ship, it is clear that she would be completed for that purpose, and that any equipments not yet given which were necessary for that purpose would be added at one time or another, the whole being in pursuance and in completion of one and the same intent; and an authority in the United States, to which I shall have occasion to refer, at all events has distinctly laid it down that it is not at all necessary that the entire equipment, without which the ship cannot be effectually employed upon this service, should be made in this country, provided that any part is made here.

Motion for Rule  
for New Trial.

*Mr. Baron Channell.*—Do you say that the statute points to something incomplete?

*Mr. Attorney General.*—The words “attempt or endeavour” plainly point to something which is incomplete.

*Lord Chief Baron.*—Suppose the case of the building of a mere hull with the intention that it should be towed away across the Atlantic by a tug, and suppose that there was some Confederate port open, which there is not, that hull being incapable in that state of being used for any purpose whether of merchandise or war, do you mean to say that that would be illegal?

*Mr. Attorney General.*—That would raise an entirely different question.

*Lord Chief Baron.*—Would it be illegal?

*Mr. Attorney General.*—I will assume for a moment that it is not illegal.

*Lord Chief Baron.*—I am bound to say that if it be illegal you would be entitled to your rule at once, because no doubt I meant to lay down distinctly that the mere hull of a vessel in no condition fit for any use whatever, might be made and sold at Liverpool to anybody.

*Mr. Attorney General.*—My case does not in the least degree require that I should argue that the case imagined by your Lordship, which is obviously not one which is very probable and practical, would be brought within the words, “equip, furnish, fit out, or arm.”

*Lord Chief Baron.*—The Court will adjourn for a short time.

*After an interval.*

*Lord Chief Baron.*—Mr. Attorney General, we have availed ourselves of the opportunity of the Court adjourning for a short time to consider the matters which you have brought before us; and without in the least saying what the opinion of any member of the Court is as to the ultimate fate of the rule, I certainly, for one, and I believe all my brothers are of the same opinion, think that what you have stated is unquestionably matter fit to be discussed. If, therefore, you are content now to take a rule to show cause why the verdict should not be set aside as being

**Motion for Rule** contrary to the evidence, or as not being warranted by the  
**for New Trial.** evidence, being contrary to the weight of it, and on the ground

of misdirection on the part of myself at the trial, or on the ground that though there might be no positive misdirection, there might be such a want of information furnished to the jury as not to enable them fairly to discharge their duty,—if you are contented to take a rule upon those two grounds, dividing the second into either positive misdirection or imperfect direction, you may take a rule to show cause at once.

*Mr. Attorney General.*—I thank your Lordship; that is what I have been asking your Lordships for, and of course, being told that I may have it, I have no more to say.

*Lord Chief Baron.*—Very well, take a rule to show cause.

*Mr. Attorney General.*—My Lords, my learned friends remind me that it will be necessary in drawing up the rule to state the grounds of the rule.

*Lord Chief Baron.*—I hope that I am not wrong in this. I believe that you may take the rule precisely in the terms which I have now announced. If you like to put it more shortly as misdirection or imperfect direction, you can do it.

*Mr. Attorney General.*—That is very satisfactory to me, my Lord.

*Mr. Baron Channell.*—We understand that that will include the incomplete information.

*Lord Chief Baron.*—Perhaps you had better take it in the language in which I pronounced it when I addressed you just now.

*Mr. Baron Pigott.*—Misdirection enables the Court to mould the meaning of that word by-and-by; misdirection is understood, but non-direction is not recognized as a ground for a rule.

*Mr. Attorney General.*—If that is so technically, of course we are quite satisfied to abide by the proper form.

*Mr. Baron Bramwell.*—There can be no doubt that it must be stated wherein the misdirection consists, but surely there will be no difficulty about it, Mr. Jones will attend to that.

*Mr. Jones.*—It is only with reference to the terms of the rule of Court upon the subject. If we go into the Court of Error they will say, "You ought to have specified it."

*Mr. Baron Bramwell.*—If there should be any difficulty, I dare say that myself, or one of my learned brothers, will settle it.

*Lord Chief Baron.*—I may state to you, Mr. Attorney General, that I imagined that I had taken pains, and I hoped that I had laid down the law as I understood it to be laid down by the highest possible authority, at least now, in what is called "another place:" some people call it "another place."

*Mr. Attorney General.*—Your Lordship may be aware that any authority to which your Lordship may be referring, is incapable of defending himself here as to what he has said in another place, or vindicating that from misinterpretation.

*Lord Chief Baron.*—I thought that I was remarkably safe in taking that course. After all I may have been wrong.

*Mr. Attorney General.*—If I can divine the sentiments of any person to whom your Lordship may be alluding, I may take the liberty of saying, that I understand that person to have vindicated the conduct of his own Government in that other place; and at the same time to have said, that in his judgment, although it may not be infallible, the “Alabama” had offended against the law of the land.

*Motion for Rule  
for New Trial.*

*After a short interval.*

*Mr. Attorney General.*—My Lords, I have received from the officer of the Court an intimation which I am afraid makes it necessary for me to refer again to a subject which I thought had been disposed of. I am informed that the grounds of misdirection must be stated on the brief.

*Mr. Baron Bramwell.*—Yes.

*Mr. Attorney General.*—I am quite content to state those which we conceive to be the grounds of misdirection, if that is meant.

*Mr. Baron Channell.*—The technical mode of drawing up the rule would be, that there was misdirection in this, then mentioning what you suppose to have been the misdirection; and if the Court has granted you the rule on the ground of incomplete or imperfect direction, then to state the grounds of that incomplete and imperfect direction.

*Mr. Attorney General.*—We shall be at liberty to state that in our own way?

*Mr. Baron Channell.*—Yes.

*Lord Chief Baron.*—Mr. Attorney General, the terms of the rule of course should be submitted to the Court before the rule is granted. There will be no difficulty about that. I have no doubt that Mr. Jones will so frame it that either the Court will assent to it, or he will assent to what the Court suggests as the mode.

*Mr. Baron Bramwell.*—Of course, Mr. Attorney General, as I understand, we cannot possibly allow a rule to be drawn up saying that the Chief Baron misdirected in this, when he says that he gave no such a direction; of course we cannot do that.

*Mr. Solicitor General.*—There is the difficulty.

*Mr. Attorney General.*—What I had proposed was to have extracted verbatim from the short-hand writer's notes certain passages to which we should object, which probably would not be excepted to. I have made a division into six heads of the language as it stands on the short-hand writer's notes; and I should have been disposed to have placed every one of them upon the rule.

*Lord Chief Baron.*—I will see Mr. Jones upon the subject if necessary.

*Mr. Baron Channell.*—There will be no difficulty about it.

*Mr. Solicitor General.*—I rather understood from your Lordships, if I may be allowed to say so, that in this particular case you

Motion for Rule would allow the rule of practice to be somewhat modified by a  
for New Trial. more general statement than usual.

*Lord Chief Baron.*—We will see whether that can be done.

*Mr. Solicitor General.*—Very well, my Lord; we will try what we can do.

*Lord Chief Baron.*—It should be observed, and it may be quite right that I should state it in public, that when the Attorney General presented to me the paper I made the instant objection to it which I have made all along.

*Mr. Attorney General.*—Yes, my Lord, we are quite aware of that.

*Lord Chief Baron.*—I said “I certainly did not mean this, and “I do not believe that I have done it,” and if the objection had been taken, as I must say I think it ought to have been, a little earlier, and if an intimation had been given to me I should have corrected it at once, and have said “Gentlemen of the jury, it is supposed that I have said so and so, I mean nothing “of the kind. On my own behalf I must say that the learned “Attorney General now remembers that the moment the paper “was put into my hands I said, ‘Mr. Attorney General that is “‘not mine.’” At present we need only say this—I repeat that if Mr. Jones will communicate with me upon the subject I have no doubt that we shall be able to put upon the rule everything which you wish put upon it.

*Mr. Attorney General.*—I should think so; I should wish to do it, with your Lordship’s permission, by taking the very terms of the short-hand writer’s notes, including the final passage to which your Lordship has referred, and then it would open to us the alternative view which your Lordship has mentioned, namely, that even if the direction properly interpreted should be considered to be right, still it might possibly have the effect of misleading the jury.

The Court then made the following rule.

#### IN THE EXCHEQUER.

Thursday, the 5th day of November 1863.

Between Her Majesty’s Attorney General, Informant, and Hermann James Sillem and others, claiming the “Alexandra,” Defendants.

#### *By Information of Seizure.*

Upon the motion of Sir Roundell Palmer, Knt., Her Majesty’s Attorney General, it is ordered by the Court that the said defendants do within a week after service of this Rule, or a copy thereof, show cause to this Court why the verdict found for the defendants upon the trial of this cause before the Right Honourable the Lord Chief Baron of this Court, at the sittings in Middlesex after Trinity term last, should not be set aside, and a new trial of this cause had on the ground—1st, that the verdict

was against the evidence; 2nd, that the verdict was against the weight of evidence; 3rd, that the learned Lord Chief Baron did not sufficiently explain to the jury the construction and effect of the Foreign Enlistment Act; 4th, that the learned Lord Chief Baron did not leave to the jury the question whether the ship "Alexandra" was or was not intended to be employed in the service of the Confederate States to cruize or commit hostilities against the United States; 5th, that the learned Lord Chief Baron did not leave to the jury the question whether there was any attempt or endeavour to equip, &c.; 6th, that the learned Lord Chief Baron did not leave to the jury the question whether there was knowingly any aiding, assisting, and being concerned in the equipping, &c.; and 7th, that the learned Lord Chief Baron misdirected the jury as to the construction and effect of the seventh section of the Foreign Enlistment Act.

Motion for Rule  
for New Trial.

---

W. H. WALTON, Q.R.

---

**Tuesday, 10th November 1863.**

**Application  
to fix a Day for  
Argument.**

**APPLICATION TO THE COURT TO FIX A DAY TO MOVE TO MAKE  
RULE FOR NEW TRIAL HEREIN ABSOLUTE.**

*Mr. Solicitor General.*—Would your Lordships allow me to ask you if it would be convenient that the case of the “Alexandra” should be taken upon this day week, that is to say next Tuesday. I have been requested by the Attorney General to put that question to the Court.

*Lord Chief Baron.*—Of course the rule has been served.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—My impression is that the earliest possible day is that which the Court would make convenient for the purpose of hearing that argument. I need not remind you, *Mr. Solicitor General*, that although we are happy on any occasion to receive the courtesy of the Law Officers of the Crown in enquiring whether a day will be convenient to the Court or not, still we are in some measure bound to take the day which is mentioned by the Law Officers.

*Mr. Solicitor General.*—Yes, my Lord; at the same time I was requested to put it to your Lordships whether next Tuesday would be a suitable day.

*Lord Chief Baron.*—This day week?

*Mr. Solicitor General.*—This day week.

*Lord Chief Baron.*—Certainly.

*Mr. Baron Bramwell.*—Had we not better consider this, that Wednesday is a special paper day, but I should think that when the argument was once begun we had better go on with it, had we not?

*Mr. Solicitor General.*—I should think so, my Lord.

*Lord Chief Baron.*—From day to day?

*Mr. Solicitor General.*—From day to day. I should think that that would be the better course.

*Mr. Baron Bramwell.*—I think that it had better be understood by the Bar, and be known that we shall not take the special paper on the Wednesday.

*Mr. Solicitor General.*—It will be understood that the “Alexandra” case goes on from day to day?

*Mr. Baron Bramwell.*—Yes; if it lasts over a day.

*Lord Chief Baron.*—May I ask, *Mr. Solicitor General*, as you have mentioned the matter, whether there was a short-hand writer at the trial, both for the Crown and for the defendants?

*Mr. Solicitor General.*—I believe there was, my Lord. I was not then in the case.

*Lord Chief Baron.*—I am aware of that.

*Mr. Solicitor General.*—I think so.



*Lord Chief Baron.*—There is no doubt that there was a short-hand writer's note.

Application  
to fix a Day for  
Argument.

*Mr. Solicitor General.*—No doubt, my Lord.

*Lord Chief Baron.*—I think it right really to mention, with respect to myself, as we see mistakes made upon the matter, that there is no doubt there was a short-hand writer's note—that there is no doubt about?

*Mr. Solicitor General.*—No doubt whatever.

*Lord Chief Baron.*—Agreed upon by both parties.

*Mr. Solicitor General.*—I believe so.

*Lord Chief Baron.*—And never objected to by me at all, on the contrary, accepted as the faithful record of all that passed.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—And I wish to state publicly here that I objected to the bill of exceptions in the first instance, and on the ground upon which I have continued to object to it.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—I did so before the jury had left the box, instantly, the moment it was put into my hands, and my reason for not immediately arguing it or pointing it out was this, that there being a short-hand writer's note, I said, "Every word which has passed has been taken down, there can be no doubt as to every syllable which has been uttered in Court, and therefore no mistake can be made upon the facts, they are all agreed upon therefore there is no occasion to argue the matter now. You have tendered a bill of exceptions, but if you wish to alter it conformably to a more correct view of the facts you can do so." That was the substance of it. It is very true that I said "I will accept any bill of exceptions," but of course that must mean, "I will accept any bill of exceptions which is warranted by the record of the evidence."

*Mr. Solicitor General.*—Of course, my Lord.

*Lord Chief Baron.*—I wish that really to be distinctly and publicly understood and known.

*Mr. Solicitor General.*—Quite so, my Lord. Of course there is no misunderstanding about this, that now the rule is substituted for the bill of exceptions.

*Lord Chief Baron.*—And I have no doubt, Mr. Solicitor General, that you will agree with me that there being clearly a right of appeal, the proceeding by this motion is far more beneficial to the Crown than going on the bill of exceptions alone.

*Mr. Solicitor General.*—If I might give an opinion, I should say far more so, my Lord.

*Mr. Baron Bramwell.*—No doubt.

*Lord Chief Baron.*—Unfortunately the Attorney General became ill, and my communication with him ceased, but I was about to suggest the propriety of bringing the whole matter before the Court, by motion, instead of going on with the bill of exceptions.

*Mr. Solicitor General.*—Your Lordship did make some suggestion of the kind, I think.

Application  
to fix a Day for  
Argument.  
—

*Lord Chief Baron.*—Yes, I believe I did.

*Mr. Solicitor General.*—Your Lordship did.

*Lord Chief Baron.*—My memory upon the subject was appealed to. There is nothing of the sort. The record of the facts was agreed upon between us, and there is no doubt whatever that the facts were unchangeable, and have never been changed from that moment to this.

---

## IN THE COURT OF EXCHEQUER AT WESTMINSTER.

MICHAELMAS TERM, 27TH VICTORIA.

BEFORE THE LORD CHIEF BARON,  
MR. BARON BRAMWELL, MR. BARON CHANNELL,  
AND MR. BARON PIGOTT.

THE ATTORNEY GENERAL *v.* SILLEM AND OTHERS.  
Claiming the Vessel "ALEXANDRA."

ARGUMENT ON MOTION TO MAKE RULE NISI  
FOR NEW TRIAL ABSOLUTE.

**FIRST DAY.**—Tuesday, 17th November 1863.

*Lord Chief Baron.*—Mr. Attorney General, have you anything to move?

ARGUMENT.

*Mr. Attorney General.*—My Lord, in the case of the Attorney General *v.* Sillem, I believe that in point of form I ought to move to make the rule absolute.

1st Day.

*Lord Chief Baron.*—That you ought to do.

*Mr. Attorney General.*—I make that motion.

*Lord Chief Baron.*—Sir Hugh Cairns shows cause.

*Mr. Attorney General.*—Yes, my Lord.

*Sir Hugh Cairns.*—My Lords, before I proceed to address your Lordships, I may perhaps be permitted to ask whether it is proposed by your Lordships that the notes of the evidence should be read before the argument proceeds.

*Lord Chief Baron.*—If you think that desirable, of course I will read the notes.

*Sir Hugh Cairns.*—No, my Lord, I cannot at all say that it would be what we should ask, because it will be my duty in the course of the observations which I have to offer to comment upon parts of the evidence, and it might perhaps lead to my reading what your Lordships had already heard.

*Lord Chief Baron.*—There is a published copy of what took place at the trial, which, generally speaking, is correct enough,—there are some verbal inaccuracies in it, one of which I shall have occasion to point out, probably, in the course of the argument. But the learned Attorney General the other day in moving for the rule went over a very great part of the evidence. The Court, I believe, is already in possession of the case as much as if it heard the evidence. If I recollect rightly, the evidence occupied the greater part of two days, and unless you think it necessary that it should be read by the Bench, that is to say, by myself, who presided at the trial, I own that I do not think that it is necessary for the argument.

ARGUMENT.

1st Day.

*Sir Hugh Cairns.*—My Lord, I am quite in your Lordship's hands; I do not at all suggest that it should be done.

*Lord Chief Baron.*—No, I should say that we are rather in your hands; if you desire it to be read it shall be read.

*Sir Hugh Cairns.*—If your Lordship puts it in that way, I should say that it would be more convenient that it should not be read; but, of course, if any question should arise as to the published report to which your Lordship has referred, we shall be corrected by any notes which your Lordship may have upon the point.

*Lord Chief Baron.*—Mr. Attorney General, you do not require the notes to be read?

*Mr. Attorney General.*—No, my Lord.

*Lord Chief Baron.*—Have you any note of the motion?

*Mr. Attorney-General.*—Your Lordship means of the motion which I had the honour to make?

*Lord Chief Baron.*—Yes.

*Sir Hugh Cairns.*—We have a short-hand writer's note of what took place on the occasion of the motion being made.

*Mr. Attorney General.*—My Lord, we have in print an uncorrected and not very accurately printed document from the short-hand note. I have no doubt your Lordships would readily see the inaccuracies wherever they were material.

*Sir Hugh Cairns.*—My Lords, I have the honour of attending your Lordships in this case on behalf of the defendants, for the purpose of showing cause against a rule which has been obtained by the Attorney General for a new trial upon grounds which have been divided into seven different heads. My Lords, as to some of those grounds one can have no doubt, simply looking at them, as to what the meaning of them is, and what is the argument proposed to be adduced in support of them. For example, I find that the first and second grounds upon which the rule has been obtained are these:—"First, that the verdict was against the evidence; secondly, that the verdict was against the weight of evidence." Those are expressions which of course we all understand and are prepared to meet. Then I find that the fourth ground is, because "the learned Lord Chief Baron did not leave to the jury the question whether the ship 'Alexandra' was or was not intended to be employed in the service of the Confederate States to cruize or commit hostilities against the United States." That, again, my Lords, is a ground which definitely states what the objection is, and which can be met accordingly. So, also, with regard to the fifth and the sixth grounds, which assert "that the learned Lord Chief Baron did not leave to the jury the question whether there was any attempt or endeavour to equip," and "that the learned Lord Chief Baron did not leave to the jury the question whether there was knowingly any aiding, assisting, and being concerned in the equipping." My Lords, all those grounds are definite. But then there remain two further grounds, which are numbered the third and the seventh, the third being "that the learned Lord

" Chief Baron did not sufficiently explain to the jury the construction and effect of the Foreign Enlistment Act," and the seventh being " that the learned Lord Chief Baron misdirected the jury as to the construction and effect of the seventh section of the Foreign Enlistment Act." My Lords, I cannot avoid saying at the outset that those are grounds which, as I find them in the rule, I am bound to suppose are in accordance with the practice of the Court; but at the same time they impose on those who, like myself, have cast upon them the duty of showing cause against a rule of this sort, a task which it is very difficult to discharge, because they inform us that after I have been heard and my learned friends who appear with me have been heard, we are then to expect an argument of the grounds and of the nature of which we are not in any way forewarned. We are told that your Lordships are to be asked to conclude that the learned Lord Chief Baron, in some way which is not specified, misdirected the jury, or did not direct the jury; but the grounds upon which that is to be contended for we are not told, and we cannot meet. I do not desire to overstate the difficulty at all; I admit that we have had some kind of intimation by a few sentences which fell from the learned Attorney General in moving for the rule, but beyond those we have had no definite statement as to what the argument of the Crown is to be.

Now your Lordships will perhaps remember that the ship in question, the " Alexandra," was seized on a particular date in this year, the 5th of April, and that she was seized in a public dock in Liverpool, the Toxteth Dock. It would be proper at the outset that I should ask your Lordships for a moment to look at the allegations in the information and in the plea which constitute the issue between the parties; and, my Lords, in this case, as indeed in all the argument which I have to submit, I will take leave to refer your Lordships to a book, with which I believe the Bench is furnished, a book which is printed by the Queen's printers, what is called the larger of two books which have been referred to, and which very conveniently comprises not merely the shorthand writer's note of the trial, subject to whatever observation may be made as to inaccuracies, but also a print both of the English and of the American Foreign Enlistment Act, and of the information, and of certain other matters which are very material to be considered. My Lords, in that book, if your Lordships are in possession of copies of it, you will find in the first page of the Appendix the information in this case; and for the purpose of pointing out the issue, it will be sufficient that I should refer your Lordships to the first count alone of the information. I hope that your Lordships have copies.

*Mr. Baron Bramwell.*—I have not got it.

*A copy was handed to Mr. Baron Bramwell.*

*Sir Hugh Cairns.*—My Lords, the information is set out sufficiently in the first page of the Appendix, and the first count is this, " For that certain persons," and then a number of names are

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

given which I pass over for the present, "and divers and very  
 " many other persons whose names are to the said Attorney General  
 " at present unknown, heretofore and before the making of the said  
 " seizure, and after the third day of July, in the year of our Lord  
 " 1819, and before the 25th day of May, in the year of our  
 " Lord 1863, to wit on the 5th day of April, in the year of our  
 " Lord 1863, within a certain part of the United Kingdom,"  
 which is mentioned "without any leave or licence of Her Majesty  
 " for that purpose first had and obtained, did equip the said ship  
 " or vessel with intent and in order that such ship or vessel  
 " should be employed in the service of certain foreign states,  
 " styling themselves the Confederate States of America, with  
 " intent to cruize and commit hostilities against a certain foreign  
 " state," namely, "the Republic of the United States." I need  
 not read it more at length. Now, my Lords, that may be taken  
 as a sample of the counts; the alteration in the other counts  
 may afterwards be referred to. Your Lordships will find  
 the plea at page 9; it is the plea of the firm which is called  
 the firm of Fawcett, Preston, and Company; the names of  
 the individual partners are given. "And hereupon Hermann  
 " James Sillem" and others, "who claim the property of  
 " the said ship or vessel called the 'Alexandra,' and the fur-  
 " niture, tackle, and apparel belonging to and on board the said  
 " ship or vessel to belong to them, by Edward Lee Rowcliffe  
 " their attorney appear here in Court, and for plea to the said  
 " information say, that the said ship or vessel, furniture, tackle,  
 " and apparel, did not, nor did any or either of them, or any part  
 " thereof, become, nor are, nor is the same, or any or either of  
 " them, or any part thereof, forfeited for the several supposed  
 " causes in the said information mentioned, or for any or either of  
 " them, in manner and form as by the said information is  
 " charged." The issue, therefore, between the parties is, whether  
 the ship, the "Alexandra," was, under the Act of Parliament,  
 forfeited for all or for any of the causes which are mentioned in  
 the information.

Now, my Lords, in the argument which I shall take leave to  
 submit to your Lordships, the course which it seems to me it will  
 be convenient to follow, and which therefore I would venture to  
 indicate now, would be this, to ask your Lordships' attention in  
 the first place, altogether apart from the evidence in this cause or  
 from the charge of the learned Judge who tried the case, to what  
 I submit is the proper construction of the Foreign Enlistment Act  
 as we find it upon the Statute Book; then to solicit from your Lord-  
 ships an attention to the evidence which was given in this case, for  
 the purpose of dealing with the rule so far as it states that the  
 verdict is against evidence, or against the weight of evidence; and  
 then in the third place to submit the view which we take of the  
 charge of the learned Lord Chief Baron, and the objections  
 which we understand are made against that charge.

Now I will ask your Lordships, in the first instance, to look at  
 the Foreign Enlistment Act, not at this moment for the purpose of

arguing upon construction, but for the purpose of pointing out the general nature, in the first instance, of the part of that Act with which we have to deal. Your Lordships here again will find the Act printed in a very convenient way, and, I believe, accurately, though, of course, I do not at all pledge myself to the accuracy of every word, but, so far as I have observed, it is accurately printed in the Appendix to the book to which I have already referred. Your Lordships will find that the Act commences at page 13 of the Appendix. My Lords, I shall have to refer to various sections in it, but at present your Lordships will favour me by turning to the seventh section alone. There are a great many words in that section, and I am afraid it must be said of them that they have contributed from their number rather to darken than to elucidate the meaning; and I fear that, in the first place, I must take the liberty of reading the section, or at all events the first half of it, for the purpose of making an observation upon it. "And be it further enacted, that

" if any person within any part of the United Kingdom, or in  
 " any part of His Majesty's dominions beyond the seas, shall,  
 " without the leave and licence of His Majesty for that purpose  
 " first had and obtained as aforesaid, equip, furnish, fit out, or  
 " arm, or attempt or endeavour to equip, furnish, fit out, or arm,  
 " or procure to be equipped, furnished, fitted out, or armed, or  
 " shall knowingly aid, assist, or be concerned in the equipping,  
 " furnishing, fitting out, or arming of any ship or vessel, with  
 " intent or in order that such ship or vessel shall be employed  
 " in the service of any foreign prince, state, or potentate, or of  
 " any foreign colony, province, or part of any province or people,  
 " or of any person or persons exercising or assuming to exercise  
 " any powers of government in or over any foreign state, colony,  
 " province, or part of any province or people, as a transport or  
 " store ship, or with intent to cruize or commit hostilities against  
 " any prince, state, or potentate, or against the subjects or  
 " citizens of any prince, state, or potentate, or against the persons  
 " exercising or assuming to exercise the powers of government  
 " in any colony, province, or part of any province or country, or  
 " against the inhabitants of any foreign colony, province, or part  
 " of any province or country, with whom His Majesty shall not  
 " then be at war; or shall, within the United Kingdom, or any of  
 " His Majesty's dominions, or in any settlement, colony, terri-  
 " tory, island, or place belonging or subject to His Majesty,  
 " issue or deliver any commission for any ship or vessel, to the  
 " intent that such ship or vessel shall be employed as aforesaid,  
 " every such person so offending shall be deemed guilty of a misde-  
 " meanor, and shall, upon conviction thereof, upon any information  
 " or indictment, be punished by fine and imprisonment, or either  
 " of them, at the discretion of the Court in which such offender  
 " shall be convicted." And then, my Lords, come provisions with regard to the forfeiture of the ship which I need not read at length.

My Lords, I must take leave, in the first place, to observe upon this section, that there are on the face of the section, without any elaborate argument, traces of very great want of accuracy and

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

care in the manner in which the ideas in the section are expressed. Now, there are two examples of that, which may be mentioned, because scarcely any dispute can arise upon them. The first is this. Your Lordships will observe that it provides in the first line "that if any person within any part of the United Kingdom" shall do so and so; "shall equip," &c. Now of course, in point of strict construction, it might be said that that indicates this idea, that the person who is spoken of here is to be himself within the kingdom, though as to the act which he is to do, it might be done either in or out of the kingdom. Of course we all agree that that is not the construction, and the information in this case proceeds upon a different construction. The information proceeds upon this construction, which no doubt is the true one; it proceeds as if the Act were worded thus:—"If any person shall within the United Kingdom" do so and so, putting the word "shall," as it ought to be put, before the word "within." And it is clear that so utterly free from care and caution is the section, that when you come to the second part of the section the words are properly collocated, thereby condemning the improper collocation in the earlier part. When your Lordships come to that part, which is about 12 lines from the bottom, and which contains the second alternative, the words are these, "or shall within the United Kingdom, or "any of His Majesty's dominions, or in any settlement," &c., putting there the word "shall" in its proper place, and admitting that it was improperly placed before. I will mention another example, my Lords, to show how very careless the section with which we have to deal is, and it is this,—Your Lordships observe the place where the word "transport" is spoken of, after the mention of the employment of the ship in the service of any foreign prince; there we find the words "as a transport or store ship, or with intent to cruize or commit hostilities against any prince," &c. The information in this case assumes (and for the present purpose I will not contest the point) that you are to read the word "transport" in connexion with these words, "against any prince, state, or potentate." Be it so. But could any expression be imagined so utterly careless or inaccurate as to talk of employing a ship in the service of a belligerent as a transport or store ship against another belligerent; as if a transport or store ship could be properly spoken of as a ship which would come under an expression of that sort, a ship employed against another belligerent?

My Lords, I pass, however, from those observations to others, which are more important. We must deal with the section, however carelessly it may be drawn, as we find it, upon proper principles of construction.

My Lords, the next observation which I make is this. Your Lordships see at once that whatever be the offences which are indicated by this section, they are offences purely and simply of positive law. They are not offences which in the remotest degree are *mala in se*, offences against morality, or offences as to which



we can have any preconceived idea as to their character or extent. My Lords, if that is required to be proved, it is proved to demonstration from this consideration, that the only offences indicated in this section are upon the assumption of acts committed "without the leave and licence of His Majesty for that purpose first had and obtained." If the Crown sanctions all or any of these things, whatever they are (of that I say nothing at present),—if the Crown sanctions all or any of these acts which are spoken of in the section, they are perfectly lawful, and are not struck at in any way by the Act of Parliament. It is therefore obvious that it cannot be supposed that there is anything in any one of the offences mentioned in the section which could in any degree be branded with the character of an offence *a priori*, an offence against morality, an offence against those principles which, in the absence of legislation, would be admitted to govern the conduct of mankind.

My Lords, I think that that consideration will make it necessary for us to enlarge a little the line of argument upon a statute of this kind, and to enter into an inquiry, which I shall make as succinct as the case seems to me to demand, into the history and the policy of the legislation upon this subject. I shall thereby endeavour to place your Lordships and to place all of us in the position of those who approached the framing of this statute; and, with a view of all the circumstances and considerations which surrounded them, I shall endeavour to ascertain what the meaning was of the words which they used to express their ideas. Now, my Lords, I will for that purpose take a part of the Act itself, namely, the preamble. It will not be all the information which we can receive upon the subject, but it will be the commencement of the investigation into the history of the Act. The preamble tells us this, at page 13: "Whereas the enlistment or engagement of His Majesty's subjects to serve in war in foreign service without His Majesty's licence, and the fitting out and equipping and arming of vessels by His Majesty's subjects, without His Majesty's licence, for warlike operations in or against the dominions or territories of any foreign prince, state, potentate, or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate, or persons as aforesaid, or their subjects, may be prejudicial to and tend to endanger the peace and welfare of this kingdom." We are told that these acts which are here described "may be prejudicial to and tend to endanger the peace and welfare of this kingdom," and that "the laws in force are not sufficiently effectual for preventing the same." What therefore was intended to be struck at and to be restrained was certain acts as to which it was said that they might be "prejudicial to and tend to endanger the peace and welfare of the kingdom," and that the laws in force at that time did not sufficiently restrain them.

Now, my Lords, in order to avoid as far as possible controversy

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

upon the point, I will take leave to repeat the view which was presented to your Lordships by the Attorney General in moving for this rule as his view of the object of the Act of Parliament. I will not admit it to be the only object, and of that I shall have something to say afterwards, but I will deal with it as at all events one and a very main object of the Act of Parliament. The Attorney General said, according to the short-hand writer's note, in moving your Lordships for this rule, after repeating the preamble, as I have done, of the Act of Parliament, "It is plain" that the object was to preserve the neutrality of this country, "and to enforce it against the subjects of this country, in matters" in which the neglect of it by those subjects, or the violation of "it here by foreign belligerent governments, was thought calculated to lead to a position, as regards foreign nations, which" would endanger the peace and welfare of the kingdom. How "would it endanger the peace and welfare of the kingdom? Manifestly by involving us in war, by making us practically so far" parties through our subjects to belligerent operations, if we "allowed this country to be made the base of those operations," either for the enlistment of men or for the equipping of vessels "of war, as to make it probable that other countries would not" endure it, but resent it, and that so we might become involved "in war. That is the mischief which the statute is manifestly" intended to protect us against."

My Lords, there is no difficulty in ascertaining, therefore, what the view of the Crown is as to the main object of the Act of Parliament. The Attorney General says that in the case of war prevailing between two belligerents, we ourselves remaining neutral, we have certain duties as a nation to perform in an international point of view. If those duties are neglected, one or other of the belligerents may complain of that neglect. If redress is not given upon that complaint, we, the neutral nation, may be involved in war; the belligerent which considers that it has a right to complain of our conduct may make it a *casus belli* against us. Therefore, says the Attorney General, it was that the Crown came to Parliament and asked for the sanction of the Legislature to a restraint put by the Crown upon those acts which, if not restrained, would be complained of by the foreign belligerent power, and if not redressed, would become the source and the origin of war against ourselves.

My Lords, if that is so, of course that again opens up a field which we shall have to examine, and invites us to consider, and very properly invites us to consider, what was the extent and ambit of international duty which one or both of the belligerent powers might call upon us to observe, and which, if not observed, might be a cause of complaint against us on the part of the belligerent powers in a war in which we were neutral.

Now, my Lords, I think that in that way we shall get, and get upon principles which the Attorney General himself admits, a key to the municipal legislation upon the subject; and fortunately, my Lords, the rules of international law upon this point will, if

I mistake not, be found extremely simple, extremely clear, and, if I may take leave to add, extremely sensible. ARGUMENT.

1st Day.

My Lords, there are two rules, as I understand it, of international law, as to which I may say they are established upon authority which cannot be doubted, and between which the whole of this inquiry will lie. Those, my Lords, are rules with regard to the conduct in war of the subjects of a neutral power. I disembarass the case of any question as to the duty of the neutral power itself as a government; that is a different thing; that stands upon much higher and broader principles; I speak of the duty in war of the subjects of a neutral power. The government of a neutral power, we all know, as a government is not at liberty to perform the smallest act which would be in itself an assistance to either of the belligerents. For example, the government of a neutral power would not be at liberty to furnish a gun, to furnish a shot, to furnish powder, or to furnish ammunition of any sort to either of the belligerents. But, with regard to the subjects of the neutral power the case is different; and the first of the two rules to which I have referred is this,—subjects of a neutral power in time of war are at liberty to supply either of the belligerents or both of the belligerents with all those articles which are termed by the generic name of “contraband of war.” My Lords, the rule as to that point I will take from an authority, as to which, at all events, in this controversy, there will be no dispute, the authority of Mr. Chancellor Kent. I cite from the first volume of his Commentaries, and from the marginal paging 142, which runs through all editions. He says, “It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate contraband goods by any complaint on the part of a neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796,” (that is to say, it was contended against the United States,) “that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent power. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.” Then, my Lords, as to what is comprehended under the term “contraband,” which is here used, we find it laid down in an earlier page of the same volume, page 135, that they are arms and ammunition, and, in a naval war, ships and materials for ships, and also horses and saddles, and naval stores, and timber, and provisions, and various other matters which I need not enumerate at length. They are, in fact, everything which

ARGUMENT.

1st Day.

either by way of supplying ships, or by way of supplying provisions and other necessities for troops or for ships, can be made useful to either belligerent,—those are the contraband articles which may thus be supplied.

My Lords, in addition to that, (although perhaps expressions so clear and so undisputed want no further authority,) I will refer your Lordships to the statement of the rule as laid down by Mr. Justice Story in an American case, printed at the end of the volume containing the present trial, viz., the case of the “*Independencia*.” I refer to the 55th page of this Appendix, and very near the top of that page, where Mr. Justice Story says, “There is nothing in our laws, or in the law of nations,” (and of course, my Lords, it is to that expression that I am referring, “the law of nations,” for I am not now upon the municipal law,) “that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.” Therefore, my Lords, apart from any municipal regulation, that rule as regards international duty is perfectly clear. No belligerent power can complain of acts of subjects of a neutral power upon this footing, — they are acts which are not in any way prohibited by any rule of international law.

My Lords, that is one of the two rules of international law to which I refer; I will now ask your Lordships’ attention to the second rule. The second rule is this,—the territory of a neutral power must be kept absolutely inviolate from anything which may be termed a proximate or immediate act of war; and the neutral Government will have a right to complain if that inviolability, so defined, of the neutral territory is infringed, either by the belligerent directly or by one of its own subjects at the instigation of the belligerent. Now, my Lords, the rule upon this point is laid down as clearly and as succinctly as the former. Your Lordships will find it in the book to which I first referred, namely, the first volume of Kent’s Commentaries, at the marginal paging 118. The author says, “It is a violation of neutral territory for a belligerent ship to take her station within it in order to carry on hostile expeditions from thence, or to send her boats to capture vessels being beyond it. No use of neutral territory, for the purposes of war, can be permitted. This is the doctrine of the Government of the United States. It was declared judicially in England, in the case of the *Twee Gebroeders*,” (a case before Sir William Scott, to which I shall have to refer); “and though it was not understood that the prohibition extended to remote objects and uses, such as procuring provisions and other innocent articles which the law of nations tolerated, yet it was explicitly declared that no proximate acts of war were in any manner to be allowed to originate on neutral ground; and for a ship to station herself within the neutral line, and send out her boats on hostile enterprises, was an act of hostility much too immediate to be permitted.” Your Lordships observe the

distinction drawn (I shall have more to say upon it afterwards) between those acts which are called immediate or proximate acts of war and those which are called remote acts of war or innocent acts. "No act of hostility is to be commenced on neutral ground. "No measure is to be taken that will lead to immediate violence. "The neutral is to carry himself with perfect equality between "both belligerents, giving neither the one nor the other any "advantage; and if the respect due to neutral territory be "violated by one party without being promptly punished by just "animadversion, it would soon provoke a similar treatment "from the other party, and the neutral ground would be "come the theatre of war." Now, my Lords, I could not help feeling surprised in observing the note of the argument of the learned Attorney General in moving for this rule, when he said, in an expression which was remarkable rather for its breadth than for its accuracy of statement, that he did not believe that it ever entered into the mind of any human being that one of the objects of the Foreign Enlistment Act was to prevent collision between the belligerents using the neutral territory. My Lords, it entered into the mind of Mr. Chancellor Kent, and it entered into the mind of Lord Stowell. The Attorney General had not been aware of that; but the expressions which they use are extremely clear and interesting, and the case which they put (as it happens,) as the consequence of a doctrine different from that which I will show your Lordships is vindicated by the Foreign Enlistment Act, is this,—If that doctrine were to be tolerated, you would have first one belligerent making use of the neutral territory for arming and for proceedings of a warlike character, you would have the other belligerent claiming to do the same, and in place of a peaceful and undisturbed territory, which a neutral nation has a right to expect its ground to be, you would have the neutral territory the theatre of collision and of war.

My Lords, the same book upon this point refers to another matter connected with what I have read, and which still further illustrates it; I mean at page 120 of the marginal paging. The author says, "Bynkershoeck makes one exception to the general "inviolability of neutral territory, and supposes that if an enemy "be attacked on hostile ground or in the open sea, and flee "within the jurisdiction of a neutral state, the victor may pursue "him *dum fervet opus*, and seize his prize within the neutral state. "He rests his opinion entirely on the authority and practice of the "Dutch, and admits that he had never seen the distinction taken "by the publicists or in the practice of nations. It appears, "however, that Casaregis, and several other foreign jurists mentioned by Azuni, held a similar doctrine." Then other foreign jurists are referred to, as to whom Chancellor Kent says, "They maintain the sounder doctrine, that when the flying "enemy has entered neutral territory, he is placed immediately "under the protection of the neutral power. The same "broad principle that would tolerate a forcible entrance upon "neutral ground or waters in pursuit of the foe, would lead

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

“ the pursuer into the heart of a commercial port. There is no exception to the rule, that every voluntary entrance into neutral territory with hostile purposes is absolutely unlawful. The neutral border must not be used as a shelter for making preparations to renew the attack; and though the neutral is not obliged to refuse a passage and safety to the pursuing party, he ought to cause him to depart as soon as possible, and not permit him to lie by and watch his opportunity for further contest.”

My Lords, in the case which was referred to in the previous passage which I read by Chancellor Kent, the case before Lord Stowell of the “Two Brothers,” which is reported in the 3rd volume of “Robinson’s Admiralty Reports,” at page 162, this question arose. There was a capture, the legality of which came in question. The capture was said to be illegal because the capturing ship at the time of the capture was lying within neutral territory, that is to say, within three miles of a neutral shore. The ship did not move herself, and did not with her guns or otherwise take any immediate part in the capture, but she sent her boats outside the neutral territory from the ship, and the boats made the capture; and it was contended that the capture was not invalid because the ship herself had not made it.

Now, Lord Stowell upon that point says, at page 164, “It is said that the ship was in all respects observant of the peace of the neutral territory; that nothing was done by her which could affect the right of territory, or from which any inconvenience could arise to the country within whose limits she was lying; inasmuch as the hostile force which she employed was applied to the captured vessel lying out of the territory; but that is a doctrine that goes a great deal too far. I am of opinion that no use of a neutral territory for the purposes of war is to be permitted; I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral ground; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted; for, suppose that even a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not itself an act directly hostile; not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon shot which shall compel

" the submission of a vessel lying at two miles distance, or  
 " whether I send out a boat armed and manned to effect the very  
 " same thing at the same distance? It is in both cases the direct  
 " act of the vessel lying in neutral ground; the act of hostility  
 " actually begins, in the latter case, with the launching and  
 " manning and arming the boat that is sent out on such an errand  
 " of force. If it were necessary, therefore, to prove that a direct  
 " and immediate act of hostility had been committed, I should  
 " be disposed to hold that it was sufficiently made out by the  
 " facts of this case. But direct hostility appears not to be  
 " necessary, for whatever has an immediate connexion with it is  
 " forbidden. You cannot, without leave, carry prisoners or booty  
 " into a neutral territory there to be detained, because such an  
 " act is an immediate continuation of hostility. In the same  
 " manner an act of hostility is not to take its commencement on  
 " neutral ground. It is not sufficient to say it is not completed  
 " there; you are not to take any measure there that shall  
 " lead to immediate violence; you are not to avail yourself  
 " of a station on neutral territory, making as it were a vantage  
 " ground of the neutral country, a country which is to carry  
 " itself with perfect equality between both belligerents, giving  
 " neither the one nor the other any advantage. Many in-  
 " stances have occurred, in which such an irregular use of a  
 " neutral country has been warmly resented, and some during the  
 " present war; the practice which has been tolerated in the  
 " northern states of Europe, of permitting French privateers to  
 " make stations of their ports, and to sally out to capture British  
 " vessels in that neighbourhood, is of that number; and yet even  
 " that practice, unfriendly and noxious as it is, is less than that  
 " complained of in the present instance; for here the ship, with-  
 " out sallying out at all, is to commit the hostile act. Every  
 " government is perfectly justified in interposing to discourage  
 " the commencement of such a practice; for the inconvenience  
 " to which the neutral territory will be exposed is obvious;  
 " if the respect due to it is violated by one party, it will soon  
 " provoke a similar treatment from the other also; till, instead  
 " of neutral ground, it will soon become the theatre of war;"

referring again there to what was expressed by Chancellor Kent  
 in his Commentaries, the circumstance of a neutral territory being  
 itself the scene of collision, as being one of the grounds which had  
 led to this international rule of war.

My Lords, I will not dwell longer upon those authorities than  
 to pray your Lordships to remember the distinction there taken,  
 which will be found, if I mistake not, extremely important as the  
 argument advances; the distinction which is there taken between  
 certain things (connected with hostilities, it may be,) which are  
 innocent, and other things connected with hostilities, which are  
 matters of complaint under international law. Those things which  
 are termed direct and proximate acts or causes of hostility are  
 deemed to be a violation of international law. Those things  
 which are remote and not proximate are not an infringement of

ARGUMENT.

1st Day.

international law; and an instance is given by Sir William Scott, even with regard to a ship admitted to be a ship which intends to commit hostility at some future period, namely, that the obtaining provisions and supplies of an innocent character, and not of a war-like character, is an act which is remote—it may be a cause of war, it may be connected with war,—but it is remote and not proximate, and the neutral nation cannot complain of any infringement of territory, if an act of that kind alone is committed upon it.

Now, my Lords, those being the two rules, which, as it seems to me, are very clearly laid down, I will ask your Lordships to consider as it were *a priori*, before approaching the history of municipal legislation or the words of municipal legislation, what would be the conclusion which we naturally should draw from these rules as to the course which municipal legislation might be expected to take. The law of nations defines a certain line outside the dominions of a state, I mean outside the land, up to which municipal jurisdiction extends, and beyond which it ceases. I do not examine the curious point whether that is measured three miles from the shore, or the distance which a cannon would carry its ball,—if the latter, the line must be a very variable one, having regard to the improvements in the art of gunnery,—but whichever the line be, it is quite immaterial for my argument, whether it is one or whether it is the other. A line is to be drawn somewhere, which is to be the limit of the territory of any particular state. Then we find that, according to the rules of international law, it is allowable to a neutral state, that is to say, to the subjects of a neutral state, to carry and to deliver outside that line, or inside it, any of those articles which are called contraband of war, guns, ammunition, ships, or any other article which may be supposed. International law also holds that you might bring a ship to the outside of that boundary wherever it is drawn,—that you might carry from the neutral state guns and ammunition, and warlike supplies of every kind, and deliver them into the ship outside the boundary, subject to the right of capture; the other belligerent, if so disposed and so able, might intercept the supplies, might capture the ship, and might seize the articles as contraband; but, subject to that, the act might be done without any offence against the principles of international law. But then, on the other hand, international law says, you must not originate on the neutral territory any proximate act of war; you must not issue out of the neutral territory with a ship which shall be prepared to commit hostilities.

*Mr. Baron Bramwell.*—I am sure I do not wish to interrupt you, Sir Hugh, but it seems to me that you have assumed very important matter in your argument, namely, that an unarmed vessel may sail in company with another ship having its armament on board, and that directly they get, say, some half dozen miles from the land, the armament may be transferred to the other ship. Have you established that by your authorities?

*Sir Hugh Cairns.*—No, my Lord; I have not come to cases



of that kind, which would be put upon municipal law; I will deal with them afterwards.

*Mr. Baron Bramwell.*—No, but upon international law. Have you established that?

*Sir Hugh Cairns.*—Upon international law, all that I come to at present is this; asking your Lordships to suppose, from rules of international law which are clearly admitted, what *a priori* might be expected to be the course of municipal legislation in defence of international law; and then I will deal with the case which your Lordship has been good enough to suggest. And I must take leave to say, that in an argument in which it does not fall to us to reply, any suggestion from any one of your Lordships, in the place of being an interruption, is that for which we should feel most deeply grateful, because it enables us to follow what is passing in your Lordships' minds.

*Mr. Baron Bramwell.*—I assure you that I made the observation which I did, because, as I understood your argument, (and nothing could be more clear, to my mind,) it assumed that the authorities which you had cited had established that it was a proposition of international law that an unarmed ship capable of receiving an armament might leave a neutral port in company with another ship capable of transferring that armament, and having that armament on board, and that when the two got beyond the territorial limit, the armament might be transferred from one to the other without a breach of neutrality. I thought you said that that had been established.

*Sir Hugh Cairns.*—I did not desire to assume that; on the contrary, I desired at this point of the argument to state this, about which, it seems to me, there can be no dispute upon the authorities, and I do not for the present propose making any particular answer to that question of your Lordship's; I simply take this case; I say it is beyond all doubt clear, according to the rules of international law, and there would be no controversy upon it, that you might bring a ship outside the limit of neutral territory,—I do not mean from within, but from without,—that you might bring a ship to the verge of neutral territory, and hold it there or anchor it there; that you might, according to the rules of international law, fill and load another ship, or barge, or anything you please, with guns or with ammunition; that you might carry that barge to the outside of the limit, and then transfer the guns and the ammunition which you had so put on board, just as you would do in a foreign port.

*Mr. Baron Bramwell.*—I beg your pardon; then I misunderstood you.

*Sir Hugh Cairns.*—I took that case purposely, because I do not think there can be any controversy as to it; the other case might require further consideration, and I shall come to it by and bye.

*Mr. Baron Bramwell.*—I beg your pardon; it was my fault; I misunderstood you.

*Sir Hugh Cairns.*—And then, my Lord, I put as a contrast to that another proposition, about which there could be no doubt is

ARGUMENT.

1st Day.

point of international law. You would not be allowed in any manner to violate, by what I term a proximate act of war, the neutral territory. You would therefore not be allowed (this is a matter about which there could be no controversy on either side) to go inside a neutral territory and there to arm and prepare for hostilities (I will say, "prepare for hostilities," in order to avoid technical words, about which a controversy might arise)—you would not be allowed to go inside a neutral territory, and arm and prepare for hostilities in a way calculated to commit hostilities, a ship which afterwards might sally out of the neutral territory, and to go beyond the limit, and, without any intervening space occurring in which it might be captured by the belligerent power, commence hostilities with a ship so armed,—because, my Lords, we can readily imagine that this would be a sort of outrage which might properly be held in such a case by either of the belligerents to be a breach of neutrality. The belligerent would say to the neutral power, "Now, we must have an understanding about this; you say that your neutral territory is to be inviolate; I agree to that. I have no right to go inside your territory and out out a ship which I see arming and preparing there to commit hostilities. I cannot violate your territory. If I went into one of your harbours to do that, you would object to it, and would prevent it, and in an international point of view I could not claim a right to do it." But then the belligerent would say, "You on your part must take care that what passes out of your territory shall pass out in such a state as that I shall have a fair chance of capturing or dealing (if I am entitled to capture or to deal with it) with that which comes outside your territory, without its having occupied itself within your territory by preparing itself for aggression upon me, so that when it comes out of your territory it shall not come out as a ship which I have to cope with as a ship of war, but as an article of property which might, if it could escape my watchful care, find its way into the port or the possession of another belligerent, but as to which I in my turn have a right to the chance of capturing it, and taking it before it could commence hostilities against me." That would be a very natural course for a belligerent to take, and very natural language for a belligerent to hold, and it is language, the sense and wisdom of which it is impossible to dispute. Therefore, my Lords, I should say *a priori*, that what we should expect to be the course of municipal legislation upon the subject would be some legislation which would guard against that evil which I have endeavoured to point out, and which, by way of restraint upon the subjects of the neutral power, would prevent its subjects doing that of which, in the language that I have endeavoured to convey, the belligerent might complain.

Now, my Lords, let us see whether that will be found to be the course of municipal legislation upon the subject; and for that purpose we have to address ourselves to the history of that municipal legislation. Your Lordships have heard, both to-day and on a former occasion, that the first Act of which we have

knowledge, the first definite municipal Act of the Legislature, was one passed by the Congress of the United States, in the year 1794, about 70 years ago. My Lords, there are various reasons why, if there be any question or doubt upon the construction of our own Act of Parliament, we may fairly look to the history of American legislation upon the subject. One reason would be that, to a very great extent, in the words of the Statute, it is found that our Act of Parliament follows the American Act of Congress. Another reason would be, that we know as matter of history that it was distinctly affirmed that the object of the legislation in this country was to follow, and to follow as closely as might be, the course of the American legislation.

ARGUMENT.

1st Day.

My Lords, I find that, with reference to the English Act of Parliament, the minister of the day, by whom it was introduced, I mean Mr. Canning, said this—I quote now from the 5th volume of the Collection of his Speeches at page 50,—“If I wished for a guide in the system of neutrality I should take that laid down by America in the days of the Presidency of Washington, and the Secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals, and condemned. Upon that occasion the Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain. Here, sir, I contend is the principle of neutrality upon which we ought to act. It was upon this principle that the Bill in question was enacted.”

My Lords, I will ask your Lordships' particular attention for a moment as a matter of history to this fact. Mr. Canning refers to certain rules which were issued by the American Government just immediately before the Act of Congress was passed,—rules which I will show your Lordships are also referred to by international writers as being the true exposition of international law. Mr. Canning refers to those rules; and he says that if he wished for a guide in the system of neutrality, he would take those rules so laid down; and he says that it was upon the principle of those rules that the English Act, as a matter of history, in his view, was enacted.

My Lords, that will bring us to the few words which I have to say upon the history of the American Act of Parliament. The subject of the history of course can only in a limited point of view be brought before, or properly entertained by, your Lordships.

ARGUMENT.

1st Day.

It is a very interesting study—it has been made, especially in recent days, the subject of very much discussion by those who treat of such matters; and the reference which I will take leave to make to it shall be of a very limited character. Now, my Lords, what we know as matter of history upon this point is this :—The American Act of Congress was passed in the beginning of the year 1794—the occurrences which led to its being passed took place in the year 1793. Your Lordships recollect that the French Republic was constituted early in the year 1793. One of the first acts which the French Republic did was to send a Minister to the United States of America—a Minister whose name was Genet. One of the first things which he did when he went to America was to promote, or I should say, to institute the equipment of privateers in American ports to cruize against and capture English vessels, the French Republic having declared war against England. At this time the Government of the United States was neutral, not only in that contest, but was at peace with all the world; and it was no doubt one leading feature in the policy of the great man who then presided over the destinies of America, to remain neutral in all contests as far as he possibly could, and to reap the advantages which a commercial country might naturally expect to reap from a state of neutrality in the midst of war. Accordingly the American Government considered the acts which were taking place under the direction of Monsieur Genet, and they endeavoured to ascertain how far those acts could be put a stop to, upon principles of international law, and if they could not be put a stop to, upon principles of international law, to ascertain how far municipal law should be called in aid, and constituted for the purpose.

My Lords, there are two or three references to matters of history which will bring us conveniently to the consideration of the American Act of Congress. In the correspondence of one of the American Ministers of the day, Jefferson, I refer to a book which is intituled “Jefferson’s Memoirs and Correspondence,” in the 3rd volume, at page 242, Mr. Jefferson, writing to Monsieur Genet, the French Minister, refers to this subject in this way,—the date of this is the 5th of June 1793, it is before the American Act of Congress was introduced,—he says : “In a conversation which I had afterwards the honour of holding with you, I observed that one of those armed vessels, the ‘Citizen Genet,’ had come into this port with a prize” (that is into the port of Philadelphia); “that the President had thereupon taken the case into further consideration, and after mature consultation and deliberation, was of opinion that the arming and equipping vessels in the ports of the United States to cruize against nations with whom they were at peace, was incompatible with the territorial sovereignty of the United States; that it made them instrumental to the annoyance of those nations, and thereby tended to compromise their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a proper reparation to the sovereignty of the country, that the armed vessels of

“ this description should depart from the ports of the United States.”

ARGUMENT.

1st Day.

My Lords, we have a letter from Washington, just about this time, to one of his Ministers, which shows us what was working in his mind, and what led afterwards to the rules which his Government framed; it is a letter to Mr. Hamilton the Secretary of the Treasury—it is printed in Sparks's Collection of the Writings of Washington, the 10th volume, at page 345. He says, writing about the same date, a few days before or after, to Mr. Hamilton: “ Dear Sir, as I perceive there has been some misconception respecting the building of vessels in our ports, which vessels may be converted into armed ones; and as I understand from the Attorney General that there is to be a meeting to-day or to-morrow of the gentlemen on another occasion, I wish to have that part of your circular letter which respects this matter, reconsidered by them before it goes out. I am not disposed to adopt any measure which may check ship-building in this country, nor am I satisfied that we should too promptly adopt measures in the first instance that are not indispensably necessary. To take fair and supportable ground I conceive to be our best policy, and it is all that can be required of us by the powers at war; leaving the rest to be managed according to circumstances, and the advantages to be derived from them.”

My Lords, the matter having originated in that way, Congress was meeting at the time, and before any Act was introduced into Congress the circular letter, referred to in this letter, was settled and sent out to the various collectors of customs in America. That circular letter contains certain rules to which I shall call your Lordships' attention, and then I shall show your Lordships (because this is what makes these references materials) by the authorities of international writers, that those rules are referred to as containing a true exposition of international law.

My Lords, in the collection of American State Papers, the 1st volume at page 45, we have the circular as finally settled, signed by Mr. Hamilton, the Secretary of the Treasury, and containing a series of rules. Now what the circular says to the collectors of customs is this. I will not read it all, but I will read those parts of it which seem to me to bear upon this point. It says, “ No armed vessel which has been or shall be originally fitted out in any port of the United States by either of the parties at war is henceforth to have asylum in any district of the United States. If any such armed vessel shall appear within your district, she is immediately to be notified to the Governor and Attorney of the district, which is also to be done with respect to any prize that such armed vessel may bring or send in. At foot is a list of such armed vessels of the above description as have hitherto come to the knowledge of the executive. The purchasing in and exporting from the United States, by way of merchandise, any articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with. If our

ARGUMENT.

1st Day.

“ own citizens undertake to carry them to any of those parties, they will be abandoned to the penalties which the laws of war authorize,” (those penalties being of course seizure and forfeiture). Then, lower down, “In case any vessel shall be found in the act of contravening any of the rules or principles which are the ground of this instruction, she is to be refused a clearance till she shall have complied with what the Governor shall have decided in reference to her. Care however is to be taken in this not unreasonably or unnecessarily to embarrass trade, or to vex any of the parties concerned. In order that contraventions may be the better ascertained, it is desired that the officer who shall first go on board any vessel arriving within your district, shall make an accurate survey of her then condition as to military equipment, to be forthwith reported to you, and that prior to her clearance a like survey be made, so that any transgression of the rules laid down may be ascertained.” That was the point to which attention was to be directed. A vessel might come, a vessel might go; the survey which was to be applied, by way of test, to her condition when she departed as differing from that which it was when she came in, was as to military equipment.

Then, my Lords, come the rules, which are very remarkable. They are eight in number. It will not be necessary for me to read them all. The first is this: “The original arming and equipping of vessels in the ports of the United States, by any of the belligerent parties, for military service, offensive or defensive, is deemed unlawful.” The second rule is this: “Equipment of merchant vessels by either of the belligerent parties in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.” Then the third rule is this: “Equipments in the ports of the United States of vessels of war in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful.” Then an exception is entailed upon that, referring to a French treaty, with regard to certain prizes taken from France, which does not bear upon the question at all, and I do not read it. Therefore, this third rule deals with the case of vessels of war in the strictest sense of the term, as to the destination and object of which there could be no doubt, in the immediate service of the government of any of the belligerents. If the equipments are of that nature, that they would be applicable either to commerce or to war, although the destination and character of the vessel are perfectly well known, still, if they are ambiguous in their nature, they are to be deemed lawful. Then the fourth rule is this:—“Equipments in the ports of the United States by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful,” with the same exception with regard to certain prizes, which relates to the

particular treaty which the United States had with France at the time, and which does not bear at all upon the general question. Then the fifth rule is,—“Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature as being applicable to commerce or war, are deemed lawful.” Then, my Lords, comes the sixth rule, which was simply the re-enactment of a clause of the treaty which the United States had with France, which was of a very peculiar kind at that time, and we find that a great deal of controversy arose upon it between the ministers and Monsieur Genet. It appeared that France had, in her then existing treaty with the United States, a provision that the United States were not to open their ports to any privateer, or to any vessel intended as a privateer against France in any war which might take place, and therefore the sixth rule provided, not upon the principle of international law, but upon the principles of the particular treaty: “Equipments of every kind in the ports of the United States of privateers of the powers at war with France are deemed unlawful.” That it related to the treaty is apparent upon the face of it. It is not a general clause applicable to privateers of any belligerent, but applies to the privateers of those particular powers at war with France, imposing upon France itself, though a belligerent, no correlative obligation. Then the seventh rule is “equipments of vessels in the ports of the United States which are of a nature solely adapted to war, are deemed unlawful.”

The result, therefore, of the whole is this, that laying down what was then conceived (we shall see whether rightly or wrongly) to be the rule of international law in the case which the United States were looking to, where there were two belligerent powers, these provisions were made, in the first place complying with the requirements of the treaty which the United States had with one of the powers, but over and above that, providing for a test to be applied in every case, whether you were dealing with a ship clearly a vessel of war, or whether you were dealing with a ship as to which you did not know whether it was meant for war or for commerce, and as to which there might be a dispute. The rules were made for one case, and the other, whether the equipments, which it was attempted and proposed to acquire in a port of the United States, were those which were solely applicable for war, or those which were doubtful and ambiguous in their character, and which would serve either for war or for purposes not warlike. It is said, if the equipments are solely applicable for war we shall prevent them; if they are those which, although applicable for war, still are not applicable solely to war, but might be supplied to any ship in order to make it a perfect ship; they are lawful and are not to be prohibited.

Then, my Lord, having, in the course of the year 1793, before Congress met, laid down those rules, Congress met at the close of the year. I will not delay your Lordships by reading the message to Congress of Washington, which explains what he had done and how he had been led into laying down those rules by the acts of Genet, the French Minister, and how he called upon

ARGUMENT.

1st Day.

ARGUMENT.  
1st Day.

Congress to give effect to what he had done by legislation. That may be presumed to be the course that would be naturally followed. And I now bring your Lordships to the consideration of the American Act which was passed under those circumstances by Congress, and which will be found at page 21 of the Appendix to the printed book of the report of the trial. The date of the Act there given is the year 1818.

*Mr. Baron Channell.*—That was the amended Act?

*Sir Hugh Cairns.*—Yes, my Lord, the amended Act, and which, for the purpose of the present discussion, may be taken to be the same as the Act of 1794. My learned friend, who has the original, will observe if I found any argument upon it which does not occur upon the original. I believe, for any purpose of comment which I have to make, the Acts will be found to be exactly the same. It does not appear that there is any preamble to this. I believe it is not customary for Acts of the States to have preambles, and I am not at all sure that it is not a better plan than our own. I may say that this Act, just like our own, is divided into clauses with regard to the army, and clauses with regard to the navy. The earlier clauses have reference to the army, but it will be proper for me, for one or two purposes, to refer to them. Your Lordships observe that the first Act does not, with regard to enlistment, deal generally with all persons who might be within the jurisdiction of the States; but it only deals with citizens of the United States. An observation upon this point was made by the Attorney General, and I think under a misconception with regard to the object of the Act, which is very plain. Of course by the municipal law, though there may be the circumstance that a foreigner may be within the jurisdiction, the municipal government has no right to interfere with the actions of that foreigner as regards enlistment, there is no reason why he should not enlist where he pleased. The municipal state, though it has jurisdiction over every one within its limits, has only jurisdiction with regard to that which savours of the allegiance of its citizens or natural born subjects. The Act is framed upon that principle.

*Lord Chief Baron.*—The Act of Congress you are referring to contemplates an offence or crime of a citizen of the United States within the territory or jurisdiction thereof; not so our own Act.

*Sir Hugh Cairns.*—Not so our own. I take leave to think that our own in that respect is founded upon much truer principles, because it is obvious that that is exactly the extent of authority which a state has over its own subjects. A state, with regard to its own subjects who owe allegiance to it, has a right to say, "You shall not in any part of the world accept employment in the military force of another power without the consent of your own sovereign."

*Lord Chief Baron.*—Therefore the 9th section of our own Act makes punishable such an offence when committed out of the kingdom.

*Sir Hugh Cairns.*—No doubt. The first section is this, "If any



“ citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people in war, by land or by sea, against any prince, state, colony, district, or people with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor,” and is finable. Then, my Lords, comes the 2nd section, which divides itself into two parts, first by way of general enactment, and then by way of qualification “that if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go, beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: Provided that this Act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who shall transiently be within the United States, and shall on board of any vessel of war, &c., which, at the time of its arrival within the United States, was fitted out and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people,” bringing it, therefore, up very much to the same as the first, qualifying it not perhaps quite so widely, but preventing its applying to any one not owing permanent allegiance to the United States.

The more important sections are those which follow. The third, which agrees to a certain extent with the seventh section of the English Act, as it now stands is this, “If any person shall within the limits of the United States,”—and there I pause to observe that I think our American brethren wrote better English in this respect than we did;—they put the “shall” in its proper place, whereas, *per incuriam*, in our own Act it has slipped out of the place where it ought to be found,—“If any person shall within the limits of the United States fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruize or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

" States for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years." Then there is a provision with regard to the forfeiture of the ship. There are some very peculiar words in the framing of that clause. It is a very singular thing, though it is not at all necessary that I should derive any argument from it one way or the other, that the words in the first part of that clause are conjunctive: " fit out *and* arm, or attempt to fit out *and* arm, or procure to be fitted out *and* armed;" whereas, when we come to the question of being concerned in the furnishing, it is " the furnishing, fitting out, or arming of any ship or vessel."

That has been a subject of controversy in America, and at a proper time I will show your Lordships what has been decided upon that in America; I only observe upon it now to show how very singularly these Acts are framed. Another thing is very singular, that when we come to the word " concerned," another term is introduced which is not found in the earlier part of the sentence, viz., " furnishing." In the early part of the sentence it is " fit out and arm." Then you have, " procure to be fitted out and armed;" then you have, " be concerned in the furnishing, fitting out, or arming." Whether that makes any enlargement of the offence or not I do not stop to consider. I only point out these things to your Lordships' attention at present. All I would say upon the construction of this section, passing by those nice criticisms as to "ands" and "ors," is this: if this section means this—You shall not, within the United States, fit out a ship as a ship of war, intending her to be employed by one belligerent against another,—then I say that exactly tallies with the rules laid down by Washington and affirmed, as I will show your Lordships, by international law writers, because I apprehend the meaning of that in the more enlarged terms would be this,—you shall not fit out a ship as a ship of war; that is, you shall not fit out a ship with any of those distinctive fittings, with any of those distinctive matters of equipment, which are not ambiguous, which may not serve for other purposes besides use in a ship of war,—you shall not fit out a ship of war with distinctive fittings or equipments, which can be of use or available in no ship except in a ship of war. That would exactly tally with the rules laid down by the American government upon the subject beforehand.

I will now ask your Lordships to go to the next section for the present purpose; the section relates to a matter which will not come in controversy here, but I will read it: " If any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship, or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruize or commit hostilities upon the citizens of the United States, or their property, or shall take the

"command of, or enter on board of any such ship or vessel for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person so offending shall be deemed guilty of a high misdemeanor," that is, to commit hostilities upon citizens of the United States, which is a wholly different matter. The Attorney General reminds me accurately that that fourth section was not to be found in the Act of 1794, but it was introduced for the first time into the Act of 1818. This is not a section dealing with the question of international law at all, it is dealing with the case of what I may call piracy or burglary, or whatever the term may be.

*Lord Chief Baron.*—It is sort of treason against the United States, you know.

*Sir Hugh Cairns.*—It is one citizen committing hostilities upon another.

*Lord Chief Baron.*—You are here distinguishing the act against which the statute is levelled, and the attempt to do the act?

*Sir Hugh Cairns.*—No, I do not at present; I will deal with that as a separate question. I do not desire to embarrass the argument I am now submitting to your Lordships by the minor argument of what may be an attempt to do a particular act. I desire to follow out the principal act itself.

*Lord Chief Baron.*—You will come to that by and bye.

*Sir Hugh Cairns.*—Yes.

*Lord Chief Baron.*—It seems to me to be extremely important, before you inquire what is meant by attempting to do a thing, and assisting and endeavouring, and procuring, and so on, to do a thing, first to get a most distinct notion of what it is that you are not to do.

*Sir Hugh Cairns.*—Just so; it is with that view I am asking your Lordship's attention to these matters.

*Lord Chief Baron.*—Considerable confusion has arisen, and much of what is said to be the confusion of the Act, arises from confounding the act that is not to be done, with the expressions used in forbidding an attempt to do it.

*Sir Hugh Cairns.*—Just so, and I may take leave to say, by way of anticipation, it will be found if we can once arrive at a clear and distinct understanding of what I may call the principal act prohibited, five minutes consideration will scatter all the rubbish that has been talked,—I do not use the expression with reference to anything which has fallen from my learned friends, but I mean the rubbish talked out of doors,—about attempts and endeavours, and commencements and assistances, which altogether assumes that every one of those things creates a new offence, different in character and form from the principal offence, whereas every one of them must range itself under the principal offence—they cannot go any higher than the principal offence can go. The fifth section seems to me, with reference to our investigation of what is the principal offence, of very great importance. It is at page 24: "If any person shall, within the territory or jurisdiction of the

ARGUMENT.

1st Day.

ARGUMENT.  
 1st Day.

" United States, increase or augment, or procure to be increased  
 " or augmented, or shall knowingly be concerned in increasing or  
 " augmenting the force of any ship of war, cruizer, or other  
 " armed vessel, which at the time of her arrival within the  
 " United States, was a ship of war, or cruizer or armed vessel,  
 " in the service of any foreign prince, or state, or of any  
 " colony, district, or people or belonging to the subjects or  
 " citizens of any such prince, or state, colony, district, or people,  
 " the same being at war with any foreign prince or state, or  
 " of any colony, district, or people with whom the United States  
 " are at peace, by adding to" (augmenting, that is to say,)   
 " the number of the guns of such vessel, or by changing  
 " those on board of her for guns of a larger calibre,  
 " or by the addition thereto of any equipment solely applicable  
 " to war, every person so offending shall be deemed guilty  
 " of a high misdemeanor, shall be fined not more than one  
 " thousand dollars, and be imprisoned not more than one year."  
 Observe what a flood of light this pours upon the whole legis-  
 lation, and how completely this legislation agrees with those rules  
 preceding it, which I called your Lordships' attention to. Here  
 you are dealing with a case of a ship as to the destination and  
 object of which there is no possible doubt. She is a ship with  
 letters of marque, or a privateer, or a national ship of war, there  
 can be no doubt about what she is to do; no doubt about the end  
 for which she is created; no doubt about why she is found on the  
 sea, and why it is she comes into a port. All those things are  
 matters not left to speculation or inquiry, or to investigation by  
 suspicion, or by proof, or in any other way; it is assumed there  
 that you have to deal with a ship of war, either belonging to, or  
 at all events in the interest of one of the belligerent parties. She  
 comes into a port of the United States. Is it unlawful to equip  
 her? Nothing of the kind; it is unlawful to augment her  
 armed force by adding to the guns, by changing them for larger  
 or other guns, but if there be any equipment (and we all  
 know there is abundance of equipment) not applicable solely  
 for warlike purposes, she is quite at liberty to have that equip-  
 ment, she is quite at liberty to be supplied with it; she may  
 come in and get it and sail away, and no person is en-  
 titled to interfere; in other words the very thing prescribed  
 by the rule laid down by Washington is to be attended to, you  
 are to look at the character of the equipment, and, just as the  
 former section said, you are not to equip a ship as a ship of war,  
 by which I understand it to mean, you are not to equip a ship  
 with the distinctive features of an equipment which is solely appli-  
 cable for war, so, where you have a ship admittedly a ship of war  
 to deal with, you may equip her, but you may not equip her with  
 an equipment which is solely applicable to war.

Then we have still, my Lords, some very important additional  
 light on the later clauses of the statute. I pass over the 6th and  
 7th, the marginal notes of which sufficiently explain them. "Setting  
 " on foot within the United States any military expedition against

"a friendly power" is illegal, and the District Courts are to have cognizance of complaints. Then by the 8th section the President may employ the forces or the militia for suppressing such expeditions. That does not seem to have been thought necessary in the English Act of Parliament, I suppose it is because our common law would amply supply that power. By the 9th section, the President may employ the forces or the militia to compel the departure of vessels. I pass over all those and now ask your Lordships' attention to the 10th and 11th sections. What does the 10th section say? "That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruize or commit hostilities against the subjects, citizens, or property of any foreign province or state, or of any colony, district, or people with whom the United States are at peace."

ARGUMENT.

1st Day.

That is a clause which, as my learned friend reminds me (and I am much obliged to my learned friend for reminding me of it), was inserted in the Act of 1818, it not being in the old Act; that perhaps makes it the more important, because it is a clause inserted after the former Act had been in existence for 26 years, and had, one may say, obtained a certain amount of judicial construction. This is a clause put into the Act of 1818, and of course one must assume in harmony with all the rest of the sections in the Act of Congress, and throwing important light upon their construction. Your Lordships will observe that the condition of the bond is not that the ship shall not be employed to cruize or commit hostilities generally, but that she shall not be employed by the owners; that is to say the owners if she belong wholly or in part to citizens of the United States, may transfer her, and she may be employed by others not citizens of the United States, to cruize or commit hostilities; The condition of the bond would not be affected, but the part of the section I am anxious to call your Lordships' particular attention to is this. What is the vessel as to which the bond can be demanded? A ship is going to sail out of a port of the United States, the collector of customs says—Well, I do not quite like the look of that vessel or what I know about her, you must give me a bond that she shall not be employed by the owner to cruize or commit hostilities. What does the owner say? the owner says, For what ship are you entitled to ask a bond, are you entitled to ask a bond because you choose to say you do not like the look of the ship or have reason to suppose that hereafter she may become a ship of war or be turned into a ship of war, and are you entitled to take a bond that she shall not be turned into a ship of war? Nothing of the kind. Before the collector of customs can establish his right to ask for the bond, he must show that the ship is an armed ship, and it is only in respect of the ship being an armed ship sailing out of a port of the United States that

ARGUMENT.  
 1st Day.

a bond can be taken. But observe, my Lords, if it is desirable in any case to take a bond by way of security and to give that peculiar power, that somewhat tyrannical power, to the collector of customs to demand a bond, surely of all cases where that is necessary the very case where it is most required is not where the matter is *patens ad oculos*, and where the collector might proceed on the other clause of the Act, where the case was complete of a ship of war sailing out of the port, but rather a case where, without having the proof complete to his eye, he would be able to suggest some reason for supposing some use was intended to be made of the ship afterwards, which would change its condition from what it then was into that of a ship of war, but he cannot do it—he has no right to demur to the departure of the ship till the owners have given a bond, unless he can show that the ship is an armed ship about to issue out of a port of the United States.

Let us couple that with the 11th section, which is also new, and therefore the argument is the more important because these are clauses added to the Act of Parliament after it had been in existence nearly 30 years, and when its scope must have been well understood and appreciated. “That the collectors of the customs be and they are hereby respectively authorized and required to detain any vessel manifestly built for warlike purposes.” This is a new class of vessel; this is not an armed vessel. Let us see under what circumstances they are authorized to detain “any vessel manifestly built for warlike purposes and about to depart from the United States.” Not generally; they cannot detain, generally, any vessel “manifestly built for warlike purposes,” but “any vessel manifestly built for warlike purposes” “of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board or other circumstances shall render it probable that such vessel is intended to be employed by the owner or owners to cruize or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace until the decision of the President be had thereon,” or until a bond be given.

Now, my Lords, this again, I venture to think, gives us a very large amount of light upon the general object and scope of the statute, because I venture to say again here if there be an occasion with reference to which it is desirable to give authority to the collector of customs to detain upon suspicion, if the scope of the Act is broader than I have suggested, if the scope of the Act is this, that it is an offence to do anything to the ship (I will not use any specific term) in a port of the United States which can afterwards be made available for the use of the ship when she becomes a ship of war, if that is the scope of the legislation, then surely the occasion on which it would be desirable to give the collector of customs authority to detain a vessel on suspicion would be this, not when the ship had those things on board, the possession of which on board clearly brought her within the Act of Congress, but an occasion on which the collector of customs would not have those visible proofs to appeal

to, but would have simply that which is indicated in the beginning of the section, namely, when he could say, "Here is a ship which, though it has no warlike equipment, yet I cannot help thinking is a ship manifestly built for warlike purposes that hereafter may be turned into a vessel of war. I now wish to detain her, in order that the question may be tried whether that is meant to be done." But he has no authority of that kind. No amount of suspicion will justify detention in a case of that sort. The cases in which a bond can be required, and the cases in which the ship can be detained, being express, other cases are negatived, and among others this clearly is negatived—the right to detain or the right to require a bond from the owner of the ship merely upon a suspicion—and I will go further, merely upon proof to be adduced that hereafter she is to be converted into a vessel of war. If manifestly built and intended for warlike purposes, and if her cargo consist principally of arms and munitions of war, and if the number of men shipped on board, or other circumstances over and above those which are cardinal and essential ingredients in the case, the collector of customs, if those things combine, may detain the ship until the decision of the President be known, or until a bond be given. How is it possible to contend, after those sections are read, that the scope or ambit of the general section meant more than that which is indicated by these sections, namely, to provide for the case where you are equipping within the ports of America a ship as a vessel of war; meaning by that, equipping her with things that are essential and distinguishing characteristics of a vessel of war.

*Mr. Baron Channell.*—The 10th section makes no reference to intent. The 11th section refers to intent to be ascertained by circumstances, either by appeal to the President, or if they are difficult to be got at, by getting a bond.

*Mr. Baron Bramwell.*—The 10th section applies to an armed ship; and the 11th section evidently applies to a ship which would not be comprehended within the 10th section, and which is not armed.

*Sir Hugh Cairns.*—Which has arms and munitions of war on board.

*Mr. Baron Bramwell.*—One would suppose from the two sections that it was intended to require a bond in the case of a vessel which could not be said to be armed, which might be something short of being an armed vessel, because if she were an armed vessel she would be within the 10th section.

*Sir Hugh Cairns.*—Clearly so; if your Lordships look at the last words of section 11 in the cases where detention of vessels is allowed, the detention is to take place "until the decision of the President be had thereon or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section." Therefore a bond as it were *in simili casu* is to be given under the 11th section.

*Mr. Baron Bramwell.*—I am afraid I did not make myself intelligible. What I meant was that section 11 seems to be di-

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

rected against a vessel which could not be said to be the armed vessel in the 10th section; and consequently this 11th section of the American Foreign Enlistment Act applies to vessels not armed.

*Sir Hugh Cairns.*—Yes, my Lord. Vessels not armed, but having those other qualifications which are mentioned in the 11th section, namely, carrying a cargo consisting principally of arms and munitions of war, coupled with this, that she is manifestly built for warlike purposes, and that the number of men shipped on board, or other circumstances, make it probable that she is intended to cruise or commit hostilities. If I might describe it in other words, the 11th section seems to provide against the case of a ship manifestly built for warlike purposes, carrying out her own equipment for warlike purposes,—carrying it out as if it was cargo, and coupled with the presence of such a number of men as distinctly mark her as a ship intended for warlike purposes.

Now, my Lords, having troubled your Lordships with the words of the American Act, it would be proper at this stage of the argument to refer you to those American authorities, so far as we have them, upon the construction of this Act of Congress, and the first, I believe, in point of time, or very nearly the first, is a case reported in Bee's American Admiralty Reports, page 76. I should mention that Bee is not the reporter; they are the decisions of an Admiralty judge of that name, of considerable reputation in America.

*Mr. Baron Channell.*—Is it the case of Moodie against the ship "Brothers?"

*Sir Hugh Cairns.*—Yes, Moodie against the ship "Brothers." The question arose in this way: A privateer had taken a prize; she was brought in for adjudication, and Mr. Moodie, who was the English Consul, and in whose name all the proceedings during the beginning of the war were taken, objected to the condemnation upon the ground that the privateer had been fitted out in a port of the United States, in contravention of the American Act of Congress, which would have made the capture illegal if it could have been proved. "The prize, upon the arrival in this port, " was with the cargo libelled by the British Consul, Mr. Moodie, " who, among other causes, alleges that the privateer," (the whole of this report is the judgment of the Court) "was originally fitted " out in the port of Charleston, or augmented in her warlike force, " contrary to the Act of Congress and law of neutrality of nations; " he therefore claims restitution of the captured vessel. The, " claimants cannot deny that the privateer was originally fitted, " armed, or manned within any of the ports of the United States; " or that she received therein any augmentation or addition " solely applicable to purposes of war. They produce a copy of " her commission from Leveaux, and plead the 17th article of " the Treaty with France in bar to the interference of this Court " in this cause. Several exhibits have been filed to show that " the captured vessel and cargo are British property, and one



“ exhibit shows that the privateer was formerly an armed vessel in the service of the King of Spain, and then mounted 18 guns; that she was captured by the ‘Montagne,’ French privateer, and brought as a prize into this port, from whence she afterwards departed with fewer guns than she had on her coming in.” It was agreed between the parties that certain evidence should be taken. The Judge continues, “ I have already by my decree in the case of the ‘Courier,’ declared my opinion of this privateer, but have reconsidered the evidence with great care, Messrs. Wallace, Libby, Williams, Carpenter, and Weyman, and the collector, and they all agree that she was a complete privateer when she first arrived there; she had then 14 guns on her main-deck, two cohorns forward, and swivels on her quarter-deck. They also agree that she received no augmentation of force here; she had been much injured in her engagement with ‘La Montagne,’ and was compelled to take off her quarter-deck. She then went to sea, returned dismasted, and took a new mast” (that was in an American port), “ but none of the witnesses saw any additional equipments. Ingram, who worked on her, says she had her quarter-deck taken down, her waist repaired, and two ports cut therein; that she was an armed vessel when she arrived, and was repaired as a privateer. The question then is wholly as to the cutting of two new ports when her waist was repaired. This arises out of Ingram’s testimony, which is at variance with that of Williams, Libby, and Carpenter, and positively contradicted by the oath of the claimants, who swear that the repairs she received in this port were necessary to her safety of sailing, but not at all applicable to war.” The learned Judge was convinced that that was the issue to be decided upon the evidence, whether the repairs or equipments she had received were at all applicable to war. “ They say that she actually went to sea with fewer guns than she had when she arrived as a prize. Admitting then, for the sake of reconciling Ingram’s testimony with that of the other witnesses, and with this oath of the claimants, that two of her ports in the waist were altered, this will not amount to any additional equipments, nor can it be considered as a breach of neutrality. If a prosecution had been instituted under the Act of the 5th of June no forfeiture could have been adjudged for so trifling an alteration. Upon the whole I retain my opinion, and that upon mature deliberation. I therefore admit the relevancy of the plea in bar.” Of course it is no part of my business to consider whether, upon the facts before that learned Judge, he was right or wrong in his conclusion as to the facts; all I refer to the case for is this; the parties thought and the Judge thought that that which he had to determine was, were there equipments put on board the ship in an American port solely applicable to war or not; he thought there were not. That was what he thought was the construction of the Act and the matter he had to consider, and with that accordingly he dealt in the way I have mentioned.

ARGUMENT.

1st Day.

My Lords, I ought to say (your Lordships will pardon me for it), that I omitted before I commenced these American cases to give your Lordships the reference which I promised to do, namely, to the authority upon international law, showing this, that the rules laid down by Washington's government and the American Act of Congress, were declaratory of, and in accordance with, the antecedent rules of international law. I promised to give your Lordships that authority as a justification for my referring to those rules, which otherwise perhaps would not have been relevant to the argument; that is laid down in the clearest way by Chancellor Kent in the same book to which I referred before. I refer to the marginal paging 122. He says, "The Government of the United States was warranted by the law and practice of nations in the declarations made in 1793 of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers in their intercourse with this country." Those are the rules of 1793 which I mentioned. "These rules were that the original arming or equipping of vessels in our ports by any of the powers at war for military service was unlawful, and no such vessel was entitled to an asylum in our ports. The equipment by them of Government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but if it were of a nature solely applicable to war, it was unlawful. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel, being within the same, and belonging to an adverse belligerent power, shall depart until 24 hours after the former without being deemed to have violated the law of nations. Congress have repeatedly by statute made suitable provision for the support and due observance of similar rules of neutrality, and given sanction to the principle of them as being founded in the universal law of nations. It is declared to be a misdemeanor." And then Mr. Kent goes on to recite the Foreign Enlistment Act of Congress, which I have already referred to, reciting it in this way, that this was an instance of Congress being supported by municipal regulation for the observance of those rules of neutrality which have been justified by, and have been founded upon, the principles of international law.

My Lords, that is an authority I said would connect as I thought in your Lordships' minds the whole chain which I have given, first the declaration, and then the Act of Congress, showing that this declaration and this Act of Congress were simply an affirmance of the rule of international law; and I think I might pause for a moment there to observe, that perhaps now at this stage of the argument I might be in a position to advert to a suggestion which fell from Mr. Baron Bramwell, when he asked me whether I proposed to consider, upon the rule of international law alone as apart from municipal law, the case that might be put of two

ships leaving a neutral port, the one unarmed and unequipped for war, and the other having on board arms and warlike equipments, proposed to be afterwards transferred to the first. The answer I should give to that is this: The definition in these rules of the principle of international law is clear and express. The gist of the whole is doing the act which is prohibited within the neutral territory. The act prohibited is the equipment of the ship, which means putting equipments into their place upon the ship: no other act is prohibited, and no other act can be brought within the scope of the act so defined. That may be an extreme case, and I will deal with extreme cases by and bye, and show your Lordships what extreme cases there are upon all sides upon a question of this kind. However, if it be an extreme case I say it is not in my humble judgment contrary to the principles of international law to send out an unarmed ship from a neutral port, a ship unarmed and unequipped for any hostile purpose, using those terms as I have explained them, and either along with her, or after her, or before her, sending out of that same port another ship with those articles on board called contraband or munitions of war, though the object may be in a foreign port or on the high seas or anywhere else out of the neutral jurisdiction to transfer the one from the other and to put the contents of the second ship on board of the first ship. It is one of those matters which leaves entirely every rule of international law unviolated. The neutral territory is not violated—nothing issues out of the neutral territory in a position which can be called a position for committing hostilities. There must be an act done in that which is unneutral ground, either the high seas or the hostile territory, and there it is that the right of the belligerent comes in to prevent and intercept that act being done, if the belligerent desires to do it.

*Mr. Baron Bramwell.*—No doubt directly the two vessels get out, the one that is to receive the armament and the other that has the armament on board, both being defenceless, both might be taken by the belligerent, they would have no rights or privileges; but if that is not a breach of the law it certainly looks very like an evasion.

*Lord Chief Baron.*—The answer may be that there is no equitable construction of a penal Statute.

*Sir Hugh Cairns.*—The moment it is said it is an evasion, the case is conceded.

*Mr. Baron Bramwell.*—The word "evasion" has two meanings. You may evade a positive enactment; for instance, if an Act says that a man receiving 100*l.* a year shall pay income tax, he may evade that by returning his income at 99*l.* 19*s.* 11½*d.* But when you have not a written law, but law depending upon principle, where you may say there is no law but the spirit of law; if you talk about evading that you infringe it.

*Lord Chief Baron.*—That would be true, and is true, in the case of many Acts of Parliament which are prohibitory, and which receive a construction from the Courts according to their spirit—no doubt about that. But the moment you come to a question of

ARGUMENT.  
 —  
 1st Day.  
 —

crime, you must be within the very words of the Act. It will not do to say you are doing that which is as bad; it may be as bad but it is not the thing.

*Sir Hugh Cairns.*—*A multo fortiori* where you are dealing with that which is made a crime by Act of Parliament in certain circumstances, but which is no *malum in se*.

*Mr. Baron Bramwell.*—I do not like to anticipate your argument; but I was addressing myself to the state of things which I thought your remark was directed to.

*Sir Hugh Cairns.*—I did not misunderstand your Lordship's observation, but I was following for a moment the point put by the Chief Baron. I understood Mr. Baron Bramwell to distinguish between an offence to be brought under the municipal law, where he would agree it must be brought legally within the words, and an offence which is supposed to be one by international law where, according to Mr. Baron Bramwell's suggestion, there might be a larger latitude and a larger scope.

*Mr. Baron Bramwell.*—I am reluctant to interrupt you by any lengthened statement; but I did not intend to propound any opinion; I only wished you to address yourself to that point. As it strikes me it is doubtful, but what I should like information upon would be this, Does international law prohibit what is (one really cannot disguise it) a quibble in practice, that two vessels may lie side by side, may wait for a fog, may slip out, and when about three or four miles from shore, that which was an unarmed vessel may become an armed vessel, and may immediately commit hostilities against the belligerent?

*Sir Hugh Cairns.*—I quite understand your Lordship as putting this matter to test the rule of international law; but observe how wide we get the moment we pass the letter of the international law, just as we do the moment we pass the letter of the municipal law; because another case might be put which would come very near that which your Lordship has supposed. Suppose that a belligerent having got a vessel wholly unarmed and wholly unsuitable for war, without equipment, wishes to have her equipments put on board, and suppose that belligerent sends the ship which is so intended to be dealt with, in safety, having escaped capture, and anchors her inside the three miles of neutral territory, waits till the equipment (which clearly so long as it is in preparation upon the neutral dry ground, is simply in the character of munitions of war, and contraband of war) is ready, waits till that is shipped, then drops outside the neutral line just immediately before an outcoming ship which takes the contents of the other on board; there is a case where you have not an attempt at doing any act within the neutral territory with regard to the ship waiting for equipment, and yet the consequences are exactly the same, the same process is performed as in the other case, and it might be said that is against the statute, but no one would contend for a moment that it was against the law. I refer simply, at present (I will return to them before I have done), to extreme cases which may be supposed in a matter of this

kind. At present I merely take leave to suggest, by way of answer to the suggestion of his Lordship, that upon these rules of international law to which I have referred, and the American declaration, they are rules of positive law, so far as they go; they are rules of positive law not to be extended beyond the expressions in them; and it is no doubt owing to the very circumstance of the neutral territory being divided by a sharp line and things being lawful outside of it which are not lawful within it, that the whole principle and reasoning of cases, like that before Lord Stowell of the "Two Brothers," assume that arbitrary cases will arise and must arise, where, upon one side of the line you will be safe, and where, on the other side of the line, you will be unsafe, and that a sharp line must be drawn clearly as the dividing line between the two classes of cases.

ARGUMENT.

1st Day.

Having by your Lordships' permission turned aside for a moment to supply that authority from Kent's book, I now return to the next case upon this Act in the American authorities. There was a trial for a misdemeanor under this Act in the year 1795, of a Frenchman named Guinet reported in Wharton's American State Trials, page 93, and before referring to any expressions found in that report, I may tell your Lordships that there were in that case two questions which arose, the one was whether there was an equipment within the terms of the Act of Congress within the American jurisdiction; the other was whether there was an intent on the part of Guinet, the prisoner, to join in using the ship as a privateer. As the facts came out and were held by the jury to have been proved, it was clear to demonstration that the equipment was an equipment which made the ship an armed ship ready to commit hostilities before she left the American jurisdiction; therefore no question arose as to an equipment not of a warlike character. The case would be no authority upon that point, nor do I believe there is any authority either in America or in this country upon that point. The other part of the case depended upon the evidence, which I will not refer to at any length, to show that Guinet was a person knowingly acting for the purpose of joining in the cruise of this privateer, and using her as an armed vessel. The indictment was that he was concerned in furnishing, fitting out, and arming a certain vessel or ship called "Les Jumcaux" lying at the port of Philadelphia. And the evidence upon the point is stated thus at page 95. The Master Warden it appears, who was a sort of custom house officer, went to examine the ship. "The Master Warden found the vessel in "great forwardness, her 20 ports open, her upper deck changed, " &c., and four iron guns on carriages, with two swivels were "lying on the adjoining wharf. He therefore desired the carpenter to desist from working any further on the vessel, and "made a report on the subject to the Secretary at War; who "directed that all the recent equipments of a warlike nature "should be dismantled and the vessel restored to the state in "which she was when she arrived. The Master Warden accordingly caused the portholes to be shut up, and even refused to

ARGUMENT.

1st Day.

“ allow any ring bolts to be fixed in the vessel. A few days before she left the port a witness said he saw four guns in her hatchway; the carpenter who repaired her said she carried with her from the wharf the four guns and two swivels that she brought in; and, according to the custom house entry, she sailed from the city in ballast, having nothing in her hold but provisions, water-casks, and wood, for the ships’ use.” That is the way the owner had entered her clearance at the custom house; she was sailing with provisions, water-casks, and wood, for the ship’s use. Then “ It appeared likewise that she came to at Wilmington;” (also within the jurisdiction) “ that an apprentice to the pilot on board of her was left behind, in order to carry on board some guns, cordage, and bedding; that accordingly he, in company with his master” (who had returned from Wilmington), “ piloted the vessel, and two black boys carried and delivered on board three or four carriage guns; that the witness (who did not go on board) saw no appearance of other guns, which he could have done, though it was dark, had there been port holes and the guns run out; that the pilot boat returned to Philadelphia the same night for the purpose of carrying to the ship some of her crew, and two or three hogsheads; that the hogsheads were put on board the pilot boat the next day, and being there opened were found to be filled with a number of little kegs, the contents of which were unknown. That at the same time 20 or 30 muskets, a number of lanterns, cans, &c., were put on board; that the whole of this transaction took place in the night time, between 10 and 11 o’clock; and that during the same night the pilot boat with three or four Frenchmen on board pushed from the wharf and sailed down to Wilmington, where the vessel still lay; that the things brought in the pilot boat being put on board the ship, she got under weigh and proceeded to Reedy Island; that there were then between 30 and 40 persons on board; that the witness could not perceive that she had any guns or gun carriages on deck, though this might be owing to its being dark; that the vessel dropped down to Newcastle and the pilot boat was again sent to Philadelphia by order of an officer (as it would seem) belonging to the vessel, who met the witness there, and between 9 and 10 o’clock at night they put one or two trunks and a large box on board the pilot boat at South Street wharf; that there were then lying on the wharf six guns without carriages, which Guinet told the witness he must take on board the pilot boat at 12 o’clock at night; that the masts were so weak that the witness was at first afraid to undertake it,—he went, however, to borrow a runner and tackle from an adjoining sloop. That Guinet concluded to postpone heaving the guns into the boat till the next evening; and in the intermediate time the Marshal seized the guns and boat, and apprehended the parties.” The arguments of counsel on both sides are given, and I observe that the District Attorney for the States, that is as we should say, the counsel for the Crown, is said to contend that “ there is evidence that the

" vessel sailed from the port with the guns that she brought into port; that four other guns with military stores were afterwards put on board of her, and that she had a crew of 30 or 40 persons; it is arming a vessel when arms are put on board, she being on her passage, and it cannot be material that those arms should be arranged in a particular manner." Then he addressed himself to the question of design and of intent, which of course would depend upon the facts proved against Mr. Guinet, which I have nothing at present to say to.

*Mr. Baron Channell.*—Guinet was convicted, I think.

*Sir Hugh Cairns.*—Yes, he was convicted, my Lord. In pursuing his argument the District Attorney says, "being converted from a merchant vessel carrying a few guns for self defence into a privateer armed for hostilities, it is clearly an original outfit within the meaning of the law,"—it is clearly an original outfit within the meaning, and of course such an outfit as would be sufficient if it had taken place for the first time. Then Mr. Justice Paterson in charging the jury says this,—“ Much has been said upon the construction of the third and fourth sections of the Act of Congress, but the Court is clearly of opinion that the third section was meant to include all cases of vessels armed within our ports by one of the belligerent powers to act as cruisers against another belligerent power in peace with the United States. Converting a ship from her original destination with intent to commit hostilities, or in other words, converting a merchant's ship into a vessel of war, must be deemed an original outfit” (that of course means converting it within the jurisdiction), “for the Act would otherwise become nugatory and inoperative. It is the conversion from the peaceable use to the warlike purpose that constitutes the offence.” It is the conversion which, again I say, must mean a conversion within the dominion of the State. Then he says, “The vessel in question arrived in this port with a cargo of coffee and sugar from the West Indies, and so appears to have been employed by her owner with a view to merchandise and not with a view to war. The inquiry therefore is limited to this consideration, whether after her arrival she was fitted out in order to cruise against any foreign nation at peace with the United States. It is true she left the port with only four guns, the number that she had brought into the port, but it is equally true that when she had dropped to some distance below she took on board three or four guns more, a number of muskets, water casks, &c., and it is manifest that other guns were ready to be sent to her by the pilot boat. These circumstances clearly prove a conversion from the original commercial design of the vessel to a design of cruising against the enemies of France, and of course against a nation at peace with the United States, since the United States are at peace with all the world.”—Then he says that it cannot be contended that the articles put on board were articles of merchandise, for if that had been the case they would have been mentioned in the clearance at the custom house; therefore there could be no doubt as to the character of the equipments put on board. “If they were not to be used

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

“ for merchandisc, the inference is inevitable, that they were to  
 “ be used for war. No man would proclaim on the house top  
 “ that he intended to fit out a privateer: the intention must be  
 “ collected from all the circumstances of the transaction, which  
 “ the jury will investigate and on which they must decide. But if  
 “ they are of opinion that it was intended to convert this vessel from  
 “ a merchant ship into a cruizer, every man who was knowingly con-  
 “ cerned in so doing is guilty in the contemplation of the law ”—  
 that means, that if it was intended to convert her from a merchant  
 ship into a cruizer within the jurisdiction. It is absurd to think  
 there would be any other offence.

The purpose for which I refer to this case is this; I do not, of  
 course, care for it at all with regard to the question of intent,—I  
 mean the intent of using for one belligerent against another; for  
 the latter part of the case, which I have not come to, will depend  
 upon the evidence in each particular case. I refer to that case for  
 this other purpose. Here was a case in which, if the argument  
 which has been suggested on the other side, (for the argument,  
 of course, I have not heard,) were to prevail, the Court and all  
 the counsel were occupying themselves in the most unnecessary  
 and superfluous way it is possible to imagine. If the argument  
 upon the other side is right, namely that if you equip in any  
 way, and to any extent whatever within the dominion a ship as  
 to which there is an intent at some other time and at some other  
 stage to convert her into a vessel of war, or to make her a  
 vessel of war, you commit an offence, what on earth was the  
 use of the elaborate evidence which was produced here, and the  
 elaborate consideration which the learned Judge gave to the  
 evidence to show that the equipment in this case was of  
 a warlike nature; because that is the point which all parties  
 addressed themselves to consider. They took it by stages. They  
 said, it is true she has not the guns on board when she is in  
 port, but she drops down and she gets the guns on board at  
 another port within the jurisdiction, and so also other equip-  
 ments which are of a warlike character. But no person denied  
 that during her stay in the United States, she had been, in the  
 general course of equipment equipped not of a warlike character;  
 those warlike equipments were superadded to the rest: and at  
 length the Judge and all the counsel agreed to take the case as  
 turning upon that, whether there had been, using the words of  
 the Judge, a conversion of the ship into a ship of war, by virtue  
 of those equipments. I say all that was perfectly idle, if any kind  
 of equipment was meant, not of a warlike character, but as to which  
 there was an intent afterwards to use it for warlike purposes. I  
 say that that is not the construction, and I say that it was not  
 assumed to be the construction in the trial of *Guinet*, otherwise  
 one-half of the trouble which was bestowed upon the trial would  
 have been thrown away.

My Lord, there is one more American case upon this point,  
 to which I would beg leave to refer, namely, the case of the  
 United States against *Quincy*, which is printed at the end of the  
 volume before your Lordships, at page 62 of the Appendix.



There is a very long, and not quite an accurate marginal note of the case, and I think your Lordships will more readily follow what was the point actually raised and decided, by my referring you to the part of Report itself. Your Lordships will find the indictment and the twelve counts which the matter turned upon at page 64. "The jurors presented that Quincy, "within the limits of the United States and the jurisdiction "of the United States, was knowingly concerned in the fitting "out of a certain vessel called the 'Bolivar' with the intent "that that vessel should be employed in the service of a foreign "people, &c.," in hostilities; and the allegation was, that he was knowingly concerned in the fitting out of this vessel—those were the words used. Then the evidence which was given, your Lordships will find at page 65. The "Bolivar" was originally a Maryland pilot boat of 60 or 70 tons. Evidence is given of the repairing and fitting out of this schooner in the port of Baltimore. The work was done at the request of Henry Armstrong and of the defendant, who superintended the same; she was fitted with sails and masts larger than was required for a merchant vessel; and she was altered in a manner to suit her for carrying passengers, and with a port for a gun. "It was in proof that the "'Bolivar' sailed from Baltimore for St. Thomas on the 27th of "September 1827, having on board provisions, 32 water casks, "1 gun carriage and slide, a box of muskets, and 13 kegs of gun-powder; and after a bond had been given by John M. Patterson "as master, and Stiles and Victor Valette of Baltimore as owners, "not to commit hostilities against the subjects or property of "any prince or state, or of any colony, district, or people with "whom the United States were at peace"—a bond, therefore, that must have provided, upon the footing of either the 10th or the 11th section of the American Act, either that she was an armed vessel, or that she was a vessel manifestly adapted for warlike purposes, of which the cargo consisted of munitions of war, and as to which there was evidence by the number of persons on board, or otherwise, that she was so intended. The bond must have proceeded upon that footing. Now, my Lord, let me stop there for the purpose of showing that after that statement of the evidence there is not to be found in that case that which would make it an authority for the Crown in this case, as is suggested in moving for this rule, because this is a case which, from what I have read, proceeded upon the assumption, upon the common ground, that there was a fitting out peculiarly adapted for warlike purposes, that is to say, a fitting out of a distinctive character, namely, a port for a gun cut and made, a gun-carriage and slide on board, and munitions of war on board in the shape of gunpowder and musketry. There was, therefore, a fitting out in the first place, and that a fitting out of that distinctive character which would be suitable for a man-of-war, and not suitable for anything else. Now, my Lords, what was the point which was argued in that case? The point your Lordships will find to be this. There was an ingenious argument alleged by counsel for the prisoner,

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

that because the American Act when speaking of the principal offence, defined the principal offence to be, if any person shall equip and arm, fit out and arm, for any warlike purpose, therefore, said the counsel for the prisoner, the secondary offence of being concerned in, &c., cannot be committed unless you can show that he was concerned in fitting out *and* arming. There must be both—both must combine. It will not be sufficient to show a fitting out even for warlike purposes; there must be not only a fitting out, but a fitting out *and* arming. Then a great deal of consideration was given to the Act upon that point, and the Court arrived at the conclusion, rather a faulty conclusion, I should say, that it assumed that it might well be that if you were indicting the person who may be called the principal, that is to say, the person who was actually fitting out, &c., you would have to show as against him, that he both fitted out and armed, but that if you were indicting a person, the accessory in the second degree, it would be sufficient to show with regard to him, either that he was concerned in the fitting out or in the arming; but the decision did not touch the point which I am endeavouring to bring before your Lordships, and the only point which could make it material to the present case,—namely, it did not show or attempt to suggest that any fitting out short of a fitting out which would be the distinctive fitting out of a vessel of war would be sufficient to constitute an offence under the Act of Congress.

The way in which the question was brought before the Court was this. Certain directions of the jury were moved for, which seems to have been the habit of the American Courts, and the defendant moved the Circuit Court that this direction should be given to the jury,—“That if the jury believe that when the ‘Bolivar’ left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas she was not armed, or at all prepared for war, or in a condition to commit hostilities, the verdict must be for the traverser.” I pass over 2, 3, and 4, which relate to a different matter, and then at the bottom of page 66, the counter direction which the counsel for the United States moved for, was this, “That if the jury found from the evidence that the traverser was within the district of Maryland knowingly concerned in the fitting out of the privateer ‘Bolivar,’ alias ‘Les Damas Argentinas’ with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata to commit hostilities, or to cruise and to commit hostilities,” &c., “then the traverser has been guilty of a violation of the 3rd section of the Act of Congress of the 20th April 1818, which punishes certain offences against the United States, although the jury should further find that the equipments of the said privateer were not complete within the United States, and that the cruise did not actually commence until men were recruited and further equipments were made at the island of St. Thomas, in the West Indies; and should further find that the ‘Bolivar,’ on her voyage from Baltimore to St. Thomas,

" had no large gun, no flints, nor any cannon or musket balls, " and that the muskets and sabres were, during the voyage, " nailed up in boxes." Therefore the whole thing assumes that the jury are to find that there was a fitting out. That was the foundation of the case. Neither direction could be available or could be required unless the jury were to find that there was a fitting out. The question of what fitting out meant upon the construction of the Act of Congress was not argued, and could not have been argued, for this manifest reason, that those whose duty it would have been to contend that fitting out meant fitting out with equipments distinctly of a warlike character, could not have so contended to any useful end in the face of that evidence, because the evidence that the fitting out was fitting out with equipments distinctly of a warlike character was enough—that there was a fitting out, and in that shape of a distinctly warlike character—and the point and the only point raised was this: Said the counsel for the prisoner, you are bound to show that within the district, there was an actual and a complete arming. No, said the counsel for the United States, that is not necessary; if you show that there was a fitting out of a warlike character, that is enough.

ARGUMENT.

1st Day.

Then the view of the Court upon that point was this—it is about the middle of page 77. " On the part of the defendant, " it is contended that the vessel must be fitted out *and* armed " if not complete, so far at least as to be prepared for war, or " in a condition to commit hostilities. We do not think this " is the true construction of the Act. It has been argued, " that although the offence created by the Act is a misde- " meanor, and there cannot legally speaking be principal and " accessory, yet the Act evidently contemplates two distinct " classes of offenders; the principal actors, who are directly " engaged in preparing the vessel, and another class who, though " not the chief actors, are in some way concerned in the prepa- " ration. The Act in this respect may not be drawn with very " great perspicuity; but should the view taken of it by the defen- " dant's counsel be deemed correct (which, however, we do not " admit) it is not perceived how it can affect the present case; " for the indictment, according to this construction, places the " defendant in a secondary class of offenders. He is only charged " with being knowingly concerned in the fitting out of the vessel " with intent that she should be employed, etc. To bring him " within the words of the Act it is not necessary to charge him " with being concerned in fitting out *and* arming; the words of " the Act are fitting out *or* arming. Either will constitute the " offence," (but there is no definition at all or no argument as to " what fitting out meant). " But it is said such fitting out must be " of a vessel armed and in a condition to commit hostilities, oth- " erwise the minor actor may be guilty where the greater would " not; for as to the latter, there must be a fitting out and " arming in order to bring him within the law. If this construc- " tion of the Act be well founded the indictment ought to charge

ARGUMENT.

1st Day.

“ that the defendant was concerned in fitting out the ‘ Bolivar,’  
 “ being a vessel fitted out and armed, &c. ; but this, we appre-  
 “ hend, is not required ; it would be going beyond the plain  
 “ meaning of the words used in defining the offence. It is  
 “ sufficient if the indictment charges the offence in the words of  
 “ the Act, and it cannot be necessary to prove what is not charged.  
 “ It is true that, with respect to those who have been denominated  
 “ at the bar the chief actors, the law would seem to make it  
 “ necessary that they should be charged with fitting out *and*  
 “ arming. These words may require that both should concur,  
 “ and the vessel be put in a condition to commit hostilities, in  
 “ order to bring her within the law. But an attempt to fit out  
 “ *and* arm is made an offence. This is certainly doing something  
 “ short of a complete fitting out *and* arming. To attempt to do  
 “ an act does not, either in law or common parlance, imply  
 “ a completion of the act or any definite progress towards  
 “ it. Any effort or endeavour to effect it will satisfy  
 “ the terms of the law. This varied phraseology in the  
 “ law was probably employed with a view to embrace all  
 “ persons of every description who might be engaged, directly or  
 “ indirectly, in preparing vessels with intent that they should be  
 “ employed in committing hostilities against any powers with  
 “ whom the United States were at peace. Different degrees of  
 “ criminality will necessarily attach to persons thus engaged.  
 “ Hence the great latitude given to the Courts in affixing the  
 “ punishment, namely, a fine not more than \$10,000, and  
 “ imprisonment not more than three years. We are accordingly  
 “ of opinion, that it is not necessary that the jury should believe  
 “ or find that the ‘ Bolivar ’ when she left Baltimore, and when  
 “ she arrived at St. Thomas, and during the voyage from Balti-  
 “ more to St. Thomas, was armed, or in a condition to commit  
 “ hostilities, in order to find the defendant guilty of the offence  
 “ charged in the indictment.” That is the point, and the only  
 “ point decided. The jury need not find, in order to comply with  
 “ the American Act of Congress, that the schooner was armed, and  
 “ they need not find that she was ready to commit hostilities ; but  
 “ the character of the equipment or the fitting out which is put on  
 “ board is not touched by the judgment of the Court, and could not  
 “ be touched by the judgment of the Court, because the character  
 “ of the fitting out, which was proved in evidence clearly and beyond  
 “ dispute, was a fitting out of a warlike character.

Now, my Lords, I believe that those cases to which I have taken  
 the liberty of referring will be found to be, if not all the American  
 cases upon the subject, yet all the American cases which legitimately  
 or properly bear upon the argument before your Lordships.

With these observations, my Lord, I pass from the American  
 Act of Congress, and from the authorities upon it, and I now  
 proceed to that which is still more important to the present case,  
 namely, the consideration of the English Act of Parliament. Here  
 again, for the purpose, not of altering what may be the legitimate  
 construction of the English Act of Parliament, but for the purpose

of putting your Lordships in possession of the circumstances as a matter of history under which it was passed; and, for the purpose of showing its compliance or intended compliance with the rules of international law, I shall take leave in the first place very shortly to refer your Lordships to what those circumstances of history were, under which that Act of Parliament was passed. My Lord, they may be stated very briefly from a history covering the period, namely, Sir Archibald Alison's history. In the first volume of his second History of Europe, at section 95, he refers to the very great popular excitement which existed in the year in which this Act of Parliament (1819) was passed, and to the circumstance that the Spanish colonies, as is well known to your Lordships, had then revolted from the mother country; that from the strong sympathy felt in this country with the revolted colonies, and from the desire which certain persons had to engage in military or naval service very large equipments, both military and naval, were being prepared in England for the purpose of assisting and aiding the revolted colonies; and that it had got to the length of actual armaments, actually enlisted soldiers, marshalled and drilled in this country, and actual armaments prepared in the ports of this country. In chapter 4, section 95, the historian says, "Ever since the contest between the splendid colonies of Spain and the mother country had begun in 1810," "it had been regarded with warm interest in Great Britain, partly in consequence of the strong and instinctive attachment of its inhabitants to the cause of freedom and sympathy with all who are engaged in asserting it, partly in consequence of extravagant expectations formed and fomented by interested parties, as to the vast field that by the independence of those colonies would be open to British commerce and enterprise." Then it continues, showing how many persons took an interest in those matters in England. He says, "Not only did great numbers of the peninsular veterans, officers and men, go over in small bodies, and carry to the insurgents the benefit of their experience and the prestige of their fame, but a British adventurer, who assumed the title of Sir M'Gregor M'Gregor, collected a considerable expedition in the harbours of this country, with which, in British vessels and under the British flag, he took possession of Porto Bello in South America, then in the undisturbed possession of a Spanish force, a country at peace with Great Britain. This violent aggression led to strong remonstrance on the part of the Spanish government, in consequence of which the government brought in a Foreign Enlistment Bill which led to violent debates in both Houses of Parliament." Well then, my Lords, he states, referring to debates in Parliament, and to the doctrines laid down there, of Martens the international writer, which Lord Lansdowne had referred to—"Admitting" (he says) "that the doctrine of Martens, on which Lord Lansdowne so strongly rested, is well founded, and that it is no violation of neutrality for one belligerent to be allowed to levy men in the dominions of a neutral power, that was

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

“ a very different thing from the course which was now adopted in Great Britain in regard to the South American insurgents. There was no levying of men by isolated foreign agents, as in the wars of the Duke of Alva or Gustavus Adolphus. Joint stock companies were formed; loans to an enormous extent granted to the governments of the insurgent states at a very high rate of interest, provided for by retaining 20 or 30 per cent. of the sum subscribed; and great expeditions sent out which at last amounted to 8,000 and 10,000 men fully armed and equipped by the companies engaged in the undertaking, in order to secure for them the payment of their dividends”—

And, my Lords, the same state of things is described by Mr. Canning himself in these words, in the fourth volume of his speeches, the book which I have already referred to. First, at page 154, he says: “ What would be the result if the House of Commons refused to arm Government with the means of maintaining neutrality? Government would then possess no other power than that which they exerted two years ago, and exerted in vain. The House would do well to reflect seriously on this before they placed Government in so helpless a situation. Did the Honourable and learned gentleman really think it would be a wholesome state of things that troops for foreign service should be parading about the streets of the metropolis without any power on the part of Government to interfere to prevent it? At that very moment such was the case in some parts of the empire, and he had little doubt that in a very short time the practice would be extended to London.” And in the same speech, further on, he says at page 159, “ Ministers did not apply to Parliament for this aid until they had tried without effect all the means which were in their power; if they were not now vested with the requisite authority, if before next summer the country should exhibit the scandalous and disgraceful scene of lawless bands of armed men raised for foreign service, parading through the streets, let not Ministers be blamed; for they had warned Parliament of the danger, and had called on them to prevent it.” That was the evil which was to be remedied. And, my Lords, I observe that the Attorney General of the day, who was Sir Samuel Shepherd, in introducing the Bill into Parliament, described the evil which had to be met in this way. I refer to the 40th volume of Hansard’s Parliamentary Debates, page 364. After describing the enlistment of troops, which was to be guarded against, he says, “ It was extremely important, for the preservation of neutrality, that the subjects of this country should be prevented from fitting out any equipments, not only in the ports of Great Britain and Ireland, but also in the other ports of the British dominions to be employed in foreign service. The principle in this case was the same as in the other, because by fitting out armed vessels, or by supplying the vessels of other countries with warlike stores, as effectual

" assistance might be rendered to a foreign power as by enlistment in their service. In this second provision of the Bill, two objects were intended to be embraced, to prevent the fitting out of armed vessels, and also to prevent the fitting out or supplying other ships with warlike stores in any of His Majesty's ports. Not that such vessels might not receive provisions in any port in the British dominions, but the object of the enactment was to prevent them from shipping warlike stores, such as guns and other things, other things obviously and manifestly intended for no other purpose than war." That was the evil which had to be guarded against,—a state of things in which you had the enlistment and the parading through the country of men in military assemblage, and where you had the supplying in the ports of the neutral country of ships, not with the ordinary equipment which a ship would require as a ship alone, but with those equipments which are of a warlike character, guns and matters *ejusdem generis*, with which the ship would be more or less able to commit hostilities the moment it left the neutral country, but at all events would be enabled in a greater or less degree to commit acts of hostility.

That being the object, let me now ask your Lordships' attention to the Act of Parliament itself. It is printed before the American Act in this volume at page 13; and now, my Lords, I will ask your Lordships to allow me to go through the clauses in a somewhat general manner before I come more particularly to the construction of the clause upon which this information turns.

The preamble of the Act tallies exactly with the history to which I have been referring your Lordships. It recites that " the enlistment or engagement of His Majesty's subjects to serve in war in foreign service without His Majesty's licence, and the fitting out and equipping and arming of vessels by His Majesty's subjects, without His Majesty's licence, for warlike operations in or against the dominions or territories of any foreign prince, state, potentate, or persons exercising, or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate, or persons as aforesaid or their subjects may be prejudicial to and tend to endanger the peace and welfare of this kingdom. And whereas the laws in force are not sufficiently effectual for preventing the same." After repealing the former Acts (which really do not throw any light upon the matter, for those Acts merely go to enlisting in foreign service, and do not deal with ships in any way whatever) the second section refers to natural born subjects, but it refers to natural born subjects either in or out of Her Majesty's dominions, as one might have expected it to do.

*Mr. Baron Bramwell.*—You have not mentioned the title of the Act, I believe.

*Sir Hugh Cairns.*—I believe lawyers say that one ought not to mention the title of an Act of Parliament, but I must say that

ARGUMENT.

1st Day.

ARGUMENT. I have heard doctrines upon that point with which I cannot concur.

1st Day.

*Lord Chief Baron.*—Is not the title put in after the Act has passed?

*Sir Hugh Cairns.*—I have several times heard learned judges observe that the title of an Act of Parliament was no part of it, because it was affixed at some subsequent period in making up the roll of Parliament. My Lord, the title is put as a question from the chair the same as any other part of the Act of Parliament;—“That this be the title of the Bill,” and there may be a division upon it, and an alteration in it, though in practice that does not very often occur.

*Lord Chief Baron.*—I suppose the Attorney General would say that the christening of the Act of Parliament, the giving it its title, has no more to do with its character than whether you call a man John or Thomas at the baptismal font.

*Mr. Attorney General.*—I am quite willing that the title should be referred to as part of the Act, my Lord.

*Sir Hugh Cairns.*—It is not in this case in particular that we should wish for any favour from the Crown to allow us to refer to the title. I am referring to it as a question of law independent of the consent of the Attorney General, but I am very much obliged to him for it all the same. The title of the Act is, “An Act to prevent the enlisting or engagement of His Majesty’s subjects to serve in foreign service, and the fitting out or equipping in His Majesty’s dominions vessels for warlike purposes without His Majesty’s licence.” I should understand by those terms, if we had no further information, that the fitting out of a vessel for warlike purposes meant the fitting out of a vessel in that distinctive manner in which a vessel which was prepared for warlike purposes would be fitted out. Then the preamble is that which I have read, namely, that the peace of the kingdom might be prejudiced, and that the laws were not sufficiently effectual for preventing the same.

Then the second section, as I said just now, deals with the case of natural born subjects, and with that case only; but it deals with natural born subjects both in and out of the jurisdiction of the Crown; the Crown of course having full authority over its own subjects wherever they may be found in any part of the world. And as to that, it provides that if they shall take or accept a military commission, or so on, they shall be guilty of a misdemeanor. But there is one reference, my Lord, to a ship or vessel in this section which I will ask your Lordship’s attention to. It occurs just at the bottom of page 14, and the top of page 15. It is in the second member of the sentence: “If any natural born subject of His Majesty, shall, without such leave and licence as aforesaid, accept or agree to take or accept any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself to serve as a sailor or marine, or to be employed or engaged or shall serve in or on board any ship or vessel of war, or in and on board any



"ship or vessel used or fitted out, or equipped, or intended to be used for any warlike purpose," (so far as equipped therefore is concerned it is equipped "for any warlike purpose") in the "service of or for or under or in aid of any foreign power," &c., then that shall be a misdemeanor. Then your Lordships will observe that when you come half way down page 15, another offence is created which extends to all persons whatsoever, whether they be subjects of the Queen or not; but that on the other hand is an offence which must be committed within Her Majesty's dominions. "If any person whatever within the United Kingdom of Great Britain and Ireland or in any part of His Majesty's dominions elsewhere," and so on, "shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure, any person or persons whatever to enlist or to enter" into the service, and so on. I refer to that because of an observation which I see fell from the learned Attorney General in moving for the rule. He seemed to draw from the second section some argument, when he came to the seventh section, which would entitle him in some way to say that the seventh section might be extended, as I understood his argument (I will refer to the short-hand writer's notes by and bye) even to a person out of Her Majesty's dominions, doing an act within them. I conceive that the distinction here is perfectly clear. First you may get a person under the second section amenable to our law, even out of Her Majesty's dominions, but then he must be a natural-born subject of the Queen. You may get, on the other hand, a person who is not a natural born subject of the Queen, doing an act for which he would be amenable to justice, but then he must do it within Her Majesty's dominions. That is the clear and ordinary distinction, and the extent and ambit of the municipal law upon all subjects.

*Mr. Baron Bramwell.*—Before you leave the 2nd section, let me ask you, would the matters prohibited by the 2nd section be illegal by international law?

*Mr. Attorney General.*—Most clearly not.

*Sir Hugh Cairns.*—My learned friend, the Attorney General, has been good enough to answer a question which was put to me, and he has answered it in a very comprehensive way, because he has affirmed authoritatively on behalf of the Crown that there is no illegality.

*Mr. Attorney General.*—Oh, no.

*Sir Hugh Cairns.*—Then my learned friend, the Attorney General, withdraws his answer. Would those be offences against international law; that is the question which your Lordship asked?

*Mr. Baron Bramwell.*—No; the question which I meant to ask was, whether that was prohibited by the earlier part of the Act of Parliament, namely, enlisting by a British subject out of the kingdom; for instance, supposing the case of all the British subjects now in the Federal States enlisting in the Federal army, are they all committing misdemeanors? Is that a breach of

ARGUMENT.

1st Day.

neutrality on our part towards the Confederates; or is it a violation of the Confederates' belligerent rights; or is it an infringement upon our sovereignty? In fact is that in any way prohibited by international law, which the men themselves are doing with the privity and sanction of the Americans?

*Sir Hugh Cairns.*—My Lord, I apprehend that the answer to that would be this,—I conceive that if there be two belligerent powers, and a third power professing to remain neutral, if the natural born subjects of that power are found enlisting in numbers in the armies of one of the belligerent powers, the other belligerent might fairly make that a subject of remonstrance and complaint to the neutral power.

*Mr. Baron Bramwell.*—But without that, we will not assume that the facts are in any doubt, they might demand an explanation of us, and they might say, What is the meaning of this continual shipment of persons which we find going on from your ports to North America? But supposing that a war broke out and British subjects abroad enlisted in the service of one of the belligerents, being out of our jurisdiction at the time, that is prohibited by this Act of Parliament, but is it prohibited by any rule of international law, so as to give any party a right of complaint against anybody else?

*Sir Hugh Cairns.*—I apprehend that one gets into a certain degree of confusion by using the term prohibited by international law.

*Mr. Baron Bramwell.*—I am not sure that you do not; I disliked the word when I used it, but I should say, is it illegal by international law in any sense?

*Sir Hugh Cairns.*—If your Lordship asks me this, Is it contrary to those duties, the fulfilment of which under the principles of international law a belligerent may require from a neutral? I should say it was. I should say that the belligerent might justly complain of it to the neutral.

*Lord Chief Baron.*—Would it be so before any proclamation by the Sovereign of the neutral state to prevent his subjects doing it?

*Sir Hugh Cairns.*—No, my Lord; when I used the term neutral state, I meant a state which has announced itself to be neutral in the contest.

*Lord Chief Baron.*—But without any proclamation to its subjects to abstain from taking part in the contest?

*Sir Hugh Cairns.*—No. I assume that the neutral state has announced in proper form its intention to remain neutral in the contest.

*Lord Chief Baron.*—That is not involved in Mr. Baron Bramwell's question.

*Sir Hugh Cairns.*—Then I should ask his Lordship, whether he desired to include or exclude the consent of the neutral. I meant to include it.

*Mr. Baron Bramwell.*—I will suppose the proclamation to be issued or not issued—that this country has done its best to prohibit the enlistment of its subjects in the armies of one of the belligerents, but nevertheless they will enlist—does that give us a

right of complaint against the state in whose pay they enlist, and does it give the opposite belligerent any right of complaint against us.

ARGUMENT.

1st Day.

*Sir Hugh Cairns.*—It gives us no right of complaint against the belligerent, but I humbly conceive that, as a matter of remonstrance between one state and another, between a belligerent state and a state professing itself to be neutral, the belligerent may come to the neutral and say, You profess to be neutral in this contest, but your subjects are enlisting in numbers in the armies arrayed against us. We complain of that; we ask you to restrain it; and we put it to you as part of your duty under international law to restrain it.

*Mr. Baron Bramwell.*—The reason I put the question to you is this: if this would not be contrary to any international law, then this Foreign Enlistment Act goes beyond international law, the scope of your general argument which is, I think, a very excellent one, being, that this municipal law is made for the purpose of enabling the municipal authorities of this country to enforce international law with more effect against its subjects. I think that is a very excellent argument.

*Mr. Baron Pigott.*—There is no doubt that international law was part of the common law before the Enlistment Act, but I think it was extremely doubtful whether you could indict a man for a breach of that common law.

*Sir Hugh Cairns.*—Though we are in the habit of saying that international law is part of the common law of the kingdom, that is one of the expressions which require a great deal of explanation. It is perfectly vain to say that for a matter which may be made the subject of remonstrance between government and government under international law, there could be on the part of our government an indictment against its own subjects; that may or may not be.

*Lord Chief Baron.*—The common law of this country knows nothing whatever of a crime committed out of the jurisdiction of this country; and except by statute there is no mode of trying even for a murder committed abroad.

*Sir Hugh Cairns.*—Just so, my Lord.

*Mr. Baron Channell.*—The question which my brother Bramwell put, was, whether you contend that the Foreign Enlistment Act does not make any act an offence, which was not an offence according to the law of nations, but only gives a different power of dealing with the offence.

*Sir Hugh Cairns.*—I am sorry to have to define from time to time the terms used, but it is very necessary in an argument of this kind. Your Lordship does not misunderstand my argument, I am sure, when you say that I am contending that anything which was an offence under international law, was an offence against the law of this country. An offence by international law is hardly a proper term; but no doubt it may be used with proper understanding.

ARGUMENT.

1st Day.

*Mr. Baron Channell.*—I think I have not made myself understood. You have been arguing that the government of the United States promulgated certain rules, and that they were rules deducible from international law; and you cited Kent for the purpose of showing that they were against international law; and it may be that though it was an offence against international law, the offence was not prohibited by a penalty, or that there was an insufficient mode of dealing with the offence. I was afraid I might have misunderstood you, and I only put the question for my own satisfaction and information, to know whether you did propose to contend that, apart from any additional remedy (that is to say, with regard to the mode of procedure), the Foreign Enlistment Act only made that an offence which was contrary to international law.

*Sir Hugh Cairns.*—Your Lordship is well aware that of course there is no privity, to use a legal term, between the subjects of this kingdom and a foreign power. A foreign power has no jurisdiction over the subjects of this kingdom. The foreign power must deal with our government, and on the other hand, our government must deal with its own subjects. Now, there are a great number of matters which are, or may become the subject of remonstrance as between a foreign government and our government, and which, if the remonstrance be not attended to, may become or may be made a *casus belli*; but it is a wholly different question, whether because those things with respect to which there is this complaint by the foreign government against our government are done by our subjects, therefore our government should come to its subjects and say, Now we agree to the justice of the remonstrances made to us, and we will indict you because you are the persons who have given rise to the remonstrances made against us as a government. But the two things are by no means correlative; and, my Lord, I understand that to be the announcement made in the preamble of this Act, or that is what the Act says. The Act says, there are an immense number of things as to which we are bound in justice to say that they are grounds of complaint against us or may be grounds of complaint against us on the part of foreign nations. At present we are powerless; the complaint is not against us as a government; we as a government have done nothing; the complaint is against acts done by our subjects; but when we turn to restrain our subjects we find that we have not power to do it, whether it be from defects in procedure or from difficulty in interfering by our common law with the offence for which a man is to be indicted by the law of the land; but we cannot do it practically. Therefore what we desire Parliament to do is this, look at what we are bound upon a legitimate and proper complaint by a foreign power to perform, and then turn and see what we require. We require more ample authority to restrain those acts so far as they are committed by our subjects. That I apprehend to be the scope of the preamble and the scope of the legislation upon the subject.

*Lord Chief Baron.*—There are certain cases in which it is said,

for instance, that the international law is part of the law of England. It is constantly laid down that the law of nations is part of the law of England; and so it is said, and most properly, that the Christian religion is part of the law of England, and that the moral law is part of the law of England; but in certain cases the law can give no assistance. In some cases there can be no doubt that all that the law can do is to say, We will give you no assistance; and it can do no more. A breach of the moral law, if it forms part of any contract, or gives rise to any consideration, is a case where the common law assists the moral law by saying, We will not enforce any contract or any apparent obligation that involves a breach of the moral law; but we can do no more. The law does not punish by indictment an infraction of the moral law, if there be no provision by statute or no other means of putting the offence in the shape of an indictment: all that the law does in the way of assistance is to say, We will not help you. And so I apprehend with respect to international law, if anything be done or agreed to be done which is a violation of the law of nations by any part of a contract or compact between two individuals the law says, We will not help you—the contract is void. And I believe it will turn out that there are many cases where all that the common law can do is to say, You must trust to yourselves and the honour of those with whom you deal, if honour has anything to do with such a transaction; the law will give you no assistance. The moment it turns out that any arrangement or contract involves a breach of the law of nations the common law will give no help.

*Sir Hugh Cairns*.—With regard to what your Lordship has just now stated, if I may say so, an eminent illustration will be found in a case which I am sure is in your Lordships' minds, which occurred a considerable time ago in the Court of Common Pleas before Lord Wynford. In the Court of Common Pleas it appeared upon a common money action that a contract had been made in a manner which involved the collection of money for the purpose of making a loan to one of two belligerents, and Lord Wynford held, and the Court of Common Pleas also, that that vitiated the transaction because the foreign nation might complain to our Government on the principles of international law. This was the case of subjects of this country aiding and abetting one of two belligerent powers. But I should be surprised indeed if I heard any one gravely contend that an indictment would lie against a person in this country for lending and advancing a sum of money to a foreign state because that state happened to be at war with another, and because there would be almost a moral certainty that that sum would be used in the prosecution of the war.

*Lord Chief Baron*.—Or selling them guns?

*Sir Hugh Cairns*.—Yes, that would come under considerations very much the same. But I was about to say that it is very curious that in the United States they had to consider a question which, if not the same, seems to me to come very close to a question put to me by Mr. Baron Bramwell, in the case of a

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

citizen of the United States, Gideon Henfield, in the time of M. Genet. The United States took this course. There was one of Monsieur Genet's privateers, on board which a citizen of the United States enlisted before the Act of Congress was passed. He enlisted on board this privateer, and was serving on board the privateer, and he was indicted for a misdemeanor. As I understand the question which Mr. Baron Bramwell put, it is, Could he be so indicted? I apprehend that.

*Mr. Baron Bramwell.*—I am sorry I did not make myself understood. The question which I really meant to put to you is this, Is there not something made an offence by the 2nd section of this Foreign Enlistment Act, which is in no way contrary to any international law or contrary to the spirit of it.

*Sir Hugh Cairns.*—I will take it by steps.

*Mr. Baron Bramwell.*—I do not say that a man could be indicted for a violation of international law. I may take the case which you put this minute, of money lent, which is considered contrary to the spirit of international law, but not contrary to the policy of our law. But I should have thought that the enlistment of our own subjects living in a foreign state in the armies of that state, was absolutely lawful in every sense.

*Sir Hugh Cairns.*—Your Lordship puts the case of enlistment only. The words are, "to serve in any warlike or military operation, in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, province, colony, or any part of any province or people, either as an officer or soldier, or in any other military capacity." Then, if your Lordship will allow me to take the section by steps, I shall deal with each. It is quite clear that there is pointed out a state of things altogether different from the case of two belligerents, and this country remaining neutral. There is struck at there a matter of a different class and character. I understand that what that points out is this, that just as by that sort of, I should perhaps call it something more than etiquette, which forbids any person in the service of Her Majesty to accept any honour or any decoration from a foreign prince, or a foreign potentate without leave, so this seems to me here to be a provision which declares that no natural born subject of Her Majesty shall without leave take service, that is to say, enlist himself in the service of a foreign prince to serve in war. That is for a reason which is very obvious, I think, and altogether different from those reasons which apply as between two belligerents, that is not in the interests of international law at all; that is to prevent a subject of the Queen taking upon himself a kind of allegiance, which entering into military service would be—taking upon himself a sacramentum which may in the course of time prove to militate against and be inconsistent with the allegiance which he owes to his own sovereign. That is clearly pointed at there. I do not mean to say that that has anything to say to international law,

or that it has anything to say to municipal law—I mean the municipal law anterior to this Act of Parliament. I do not suppose that it would be contended that it could be made the subject of an indictment at common law irrespective of legislation. Whether that was included in one of those various Acts that were repealed and it was thought desirable to re-enact *pro tanto* the Act which so included it, I cannot answer. It may very well be that it was one of the things included in one of the repealed statutes, and as they were repealed as a whole, it may have been thought desirable to re-enact it here; but that does not seem to me to bear upon the question of international law at all.

ARGUMENT.

1st Day.

Now, my Lord, the next part of the section is this, “If any natural born subject of His Majesty shall without such leave or licence as aforesaid, accept or agree to take or accept any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself to serve as a sailor or marine, or be employed or engaged, or shall serve in or on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped, or intended to be used for any warlike purpose in the service of, or for, or under, or in aid of any foreign power, prince,” &c., “or if any natural born subject of His Majesty shall without such leave and licence as aforesaid engage, contract, or agree to go, or shall go to any foreign state, country, colony, province or part of any province, or to a place beyond the seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of or for or under or in aid of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country,” and so on, “either as an officer or a soldier, or in any other military capacity,” &c., “although no enlisting money or pay or reward shall have been or shall be in any of the cases aforesaid actually paid to or received by him or by any person to or for his use or benefit.” There, again, your Lordships observe that what is pointed at here, and struck at here is something altogether disconnected with any carrying on of a war by one belligerent against another. It is the simple taking of service under a foreign power; and the Crown thinks it fit to ask Parliament to give it the power to restrain its own subjects from enlisting in foreign services without leave. There is nothing more in it than that. There is no question whatever of its being contrary to international law.

Then, my Lords, the next part of the section is, “If any person whatever within the United Kingdom of Great Britain and Ireland, or in any part of His Majesty’s dominions elsewhere,” &c. “shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure any person or persons whatever to enlist or to enter or engage to enlist or to serve, or to be employed in any such service or employment as aforesaid

ARGUMENT.

1st Day.

“ as an officer,” &c. “ for, or under, or in aid of any foreign prince,” &c. “ whether any enlisting money be received or not, in any of those cases the person shall be guilty of a misdemeanor.” Therefore after going through the whole of the section, we find that the motive with which service was to be taken in the foreign army is immaterial. It may not be to serve in war at all necessarily; it may be to be a part of the standing army of the state; but whether or not, the legislature insists that that shall not be done without the leave of the Crown given for that purpose. Therefore we may remove (and this, I think, will answer the question which Mr. Baron Bramwell was good enough to call my attention to) the second section altogether from the argument which I took leave to submit to you, the argument which suggested that the measure of international duty was the measure and the extent of municipal provision in the sections of this Act as to ships. That may not apply to section 2, because that section does not deal directly with the question of international duty, but it deals with the question of allegiance between the crown and its own subjects.

Then the 3rd section is by way of exception from the second, and may be passed over. The fourth is as to the issuing of warrants and the trial. The fifth is as to vessels with persons on board engaged in foreign service being detained at any port: that is in aid of the second, the third and the fourth sections, and so is the sixth; and there ends the series of provisions, which are very much broader and wider than any question of aiding one belligerent against another. Those are questions of taking service without the leave of the Queen in any service which would militate against the allegiance which the subject owes the Queen. The seventh section is the one which I say is the expression of international law upon the subject, and is to be construed, as I apprehend, with that light thrown upon it.

The first observation which I shall take leave to make upon that 7th section is to remind your Lordships of what I have already said. I am sure that it has not passed from your Lordship's mind that the circumstance that the whole is prefaced by these words, “ without the leave and licence of Her Majesty,” shows that there is nothing in this which can be said *à priori* to involve any offence in the nature of *malum in se*, or an offence as regards the existence of which you can have any preconceived or any preformed opinion. A very strong instance of that kind has occurred in our own recollection— I believe in the present year. I refer of course to the case of China, where, in a war in which the Government of China are belligerents against a certain portion of the empire of China who are in revolution, we have seen from our own shores an expedition go out, fitted out in the most formal way as ships of war, commanded by officers, some of whom were in Her Majesty's service: but the whole was done by the leave of the Crown, given by order in Council for the purpose. It is therefore one of those things in which the Crown may throw open the whole of that, whatever it may be, which is covered by



the 7th section, if it so thinks fit. There is therefore no moral offence—no *malum in se*—which is struck at by the section.

ARGUMENT.

1st Day.

The next point which I ask your Lordships to consider is this. My object of course is to determine what is the principle of the entire offence which is defined by this section. We must go by steps in order to ascertain the answer to that question, and the first thing I ask your Lordships to consider is this—Is it by this section made an offence to build—is there a prohibition against building, a ship? Of course by the term building I mean as distinguished from equipping, fitting out, furnishing, or arming. I take the case in which I have to deal with mere structure as distinguished from those things which, as we all know, are superadded after the hull of a ship is completely built and is finished as a ship, or, as it is sometimes described, as the complete hull of a vessel. Now, my Lord, in the first place I say that the most cursory inspection of the words I think would lead us to conclude that there is assumed throughout this section from beginning to end, that before you come to ascertain whether the offence is or is not committed there is a ship or vessel in existence. There is a ship or vessel spoken of, which is to be “equipped, furnished, fitted out, or armed.” The ordinary and natural construction of those terms would be that the ship was in existence as a ship, and that something was to be superadded to the ship, which has occurred here, whatever it may be, equipping, fitting out, or arming.

*Mr. Baron Bramwell.*—The mere sale is not prohibited.

*Sir Hugh Cairns.*—I am avoiding for this moment what is to be the line of demarcation, which I will deal with by and bye; but I am now inquiring what is the meaning of the phrase “equipping, fitting out,” &c. At present, all I say is—

*Lord Chief Baron.*—Some meaning must be given to the clause consistent with the right to build.

*Sir Hugh Cairns.*—That is all I desire at present.

*Lord Chief Baron.*—Had it been intended that the ship should not be built, nothing would have been more easy than to say so.

*Sir Hugh Cairns.*—Just so. I was going to add that in addition to its being the natural construction, the section speaks of the vessel, and speaks of the fitting out of the ship or vessel, as a pre-existing thing; and the observation which your Lordship has made seems to me conclusive, that if it was intended to have said you shall not build a ship, nothing would have been simpler than to have said so in such a way as that there could be no misapprehension about it. But the forfeiture clause makes it still more clear. The Act says, “And every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to, or be on board of any such ship or vessel shall be forfeited,” and still further, towards the end of the clause, it says, “And that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong

ARGUMENT. "to or be on board of such ship or vessel may be prosecuted and  
 1st Day. "condemned in the like manner and in such Courts as ships or  
 "vessels may be prosecuted and condemned for any breach of the  
 "excise laws." Therefore, your Lordships observe, that when  
 you come to the end there is a distinction made between the two  
 things spoken of, namely, the ship or the vessel itself, and the  
 furniture, the equipment, the stores, the ammunition, and every-  
 thing else that may be connected with the vessel.

In addition to that, in the part of the section which speaks of  
 the issuing or delivering of a commission, these words occur,  
 "for any ship or vessel, to the intent that such ship or vessel  
 "shall be employed as aforesaid;" again speaking of the  
 existence of the ship or vessel as a thing independent of any  
 equipment or outfit which may be placed upon it. I may say,  
 my Lords, as to that, that if the argument is maintained on the  
 other side, (I do not know, of course, whether it will be main-  
 tained or not, for we have not had an opportunity of hearing the  
 arguments of the Crown,) which I have seen maintained out of  
 doors, namely, that the moment you find any part of the structure  
 of a vessel to be a part which is suitable for a vessel of war, and  
 not for a vessel of commerce, that ship is struck at and comes  
 within the ambit of this Act of Parliament; if that argument is  
 maintained, it must go to this length; that if it were the case, as  
 very probably it is, that in laying down the keel of a ship, the  
 keel may be laid down of a kind more or less fitted for a ship of  
 war, according as you do or do not intend to employ the vessel as  
 a ship of war, if the keel be laid down with the intent that she  
 shall be used as a ship of war, then, that is an offence committed  
 within the Act; it is a misdemeanor, and there is a forfeiture,  
 not of the ship, for there is no ship to be forfeited, but a  
 forfeiture of the keel so laid down. That would be absurd. I  
 really do not know that the argument requires any graver con-  
 sideration; it would be absurd to say, that where the Act speaks  
 of a ship or vessel being forfeited with her equipments, that is  
 satisfied and met by the mere laying down of the keel, which in  
 no sense can be called a ship, much less any part of the equipment  
 of a ship.

If I carry your Lordships with me in that observation, and if  
 you ultimately are of opinion, as I think you will be, that it is  
 impossible to contend that building, as distinguished from equip-  
 ment and furniture, is struck at here, you will observe that there  
 are other matters here connected with ships, which are not in any  
 way mentioned or restrained; for example, there is nothing here  
 which restrains the hiring of a ship, or the hiring of room in a ship,  
 for the purpose of carrying out warlike stores, to be delivered  
 either to the ship abroad, or to a port abroad; there is not  
 a word which would indicate that that was to be an offence in any  
 shape or form. Again, there is nothing here which indicates that  
 the building and fitting out of a class of ships which are well  
 known in war, and which are called despatch boats, is intended  
 to be restrained or struck at by the section. Yet the great im-

portance of vessels of that kind is perfectly well known. I think it is said that Lord Nelson said at various times, that the whole of his expedition was paralyzed, from the want of those despatch boats. Indeed, of course one knows without any explanation, that those boats must be of the greatest importance to any warlike expedition. Yet there is nothing here in this Act to restrain the fitting out and equipment of a ship of that kind.

ARGUMENT.

1st Day.

Now I am anxious to ask your Lordships to go a little further in the consideration of the case of a ship built merely, as distinguished from being fitted out or equipped,—and upon this point a question was put to my learned friend in moving for the rule, which he answered in the way I will state to your Lordships. The Lord Chief Baron put this question to my learned friend the Attorney General. “Suppose the case of the building of a mere hull, with the intention that it should be towed away across the Atlantic by a tug, and suppose there was some Confederate port open, which there is not, that hull being incapable in that state of being used for any purpose, whether of merchandise or war, do you mean to say that that would be illegal?” The Attorney General says, “That would raise an entirely different question. The Lord Chief Baron.—Would it be illegal? Mr. Attorney General.—I will assume for a moment that it is not illegal, Lord Chief Baron.—I am bound to say that if it were illegal, you would be entitled to your rule at once, because no doubt I meant to lay down distinctly that the mere hull of a vessel in no condition fit for any use whatever, might be made and sold at Liverpool to anybody. Mr. Attorney General.—My case does not in the least require that I should argue that the case imagined by your Lordship, which is obviously not one which is very probable and practical, would be brought within the words ‘equip, furnish, fit out, or arm.’” I do not know whether my learned friend meant to say, that he conceded the question that was put by your Lordship, or whether he merely intended to say, that for argument sake, and for the time only, without committing himself to any proposition which was to last throughout the case, he would take it so.

*Mr. Attorney General.*—I only said that it was not the case before the Court.

*Sir Hugh Cairns.*—Exactly; but I beg leave to think, my Lords, with great submission to my learned friend, that when the Crown comes here to ask the Court to put a construction upon an Act of Parliament, which shall be a rule for the subjects of the Crown to follow, the Crown is bound to deal with a question of that kind, not by saying it is not the case before the Court, or it is a case which I will admit for a few moments; but the Crown is bound to come forward with a theory and with some view upon a subject of this kind, in the understanding of which by those concerned there can be no difficulty. But I beg leave to submit with perfect confidence that it will be your ultimate view of it; that as there is nothing in the section to forbid the building of the hull of a ship as distinguished from the outfit of it, so there is

ARGUMENT.

1st Day.

nothing whatever which forbids the taking the hull so built into the possession of a tow boat, and towing it like any other article of merchandise (contraband, if you like, still an article which may legitimately be passed over or sold), and carrying it out of the jurisdiction of the neutral country into a Confederate port, or to any other place to which it may be thought desirable to take it.

And, my Lords, I cannot help remarking here upon the observation of my learned friend the Attorney General, who says that this is not a very probable and practical supposition. Let us not talk here about this Act of Parliament as if it were an Act drawn up and framed with reference to the United States, or the Confederate power; neither of them were thought of at the time when it was framed. I agree, my Lords, that it is not a very practical supposition that a large ship of war can be towed across the Atlantic by a tug boat, but I will suppose cases as to the practicability of which there can be no doubt. Let us suppose that France and Russia were at war, and we neutral, am I to be told that the supposition which I am going to make is not a practical one? I suppose that it suits France in that war, either in consequence of her own ports being full, or for some other cause, to have a ship built in England. She sends over orders to a ship builder at Southampton or Portsmouth to build a vessel suitable for a warlike purpose. He builds and completes the hull in every way, but he does not fit out, equip, or arm it. The hull so completed is taken possession of by a tow boat; what is there impracticable in the idea of a tow boat towing over that hull to Brest? it might be done perfectly well. Of course it is liable to capture by the other belligerent on the way. Of course when the hull goes to Brest the guns for that hull, the rigging, the sails, and anything else which the ship may require to make it a complete ship, may be shipped at the port of Southampton, at the port of Portsmouth, at the port of London, at the port of Liverpool, or anywhere else you please, and may be sent, as contraband of war may be sent, out of the port, and may be carried across to a French port, and any use that may be thought proper may be made of them there, whether to put upon the hull or not, as may be thought desirable.

Then, my Lord, if that be so I go a step further, and I ask your Lordships if it be the case that a hull completed and built, we will say in Southampton, or Portsmouth, may be taken possession of by a tow boat and towed across the Channel into a port of France (the case which I have supposed,) is it to be said that it is not competent to put upon that ship those appurtenances which will enable it without the assistance of a tow boat, to navigate that Channel—in other words to put sails on it, if that is desirable, or to put a steam engine and boilers if that is the mode of propulsion which is to be adopted, into the ship? Is it equipping it, or furnishing it, or fitting it out as a ship of war to take that course?—I say it is not.—I say it is not any more a ship of war when that is done than it was before.—I say it is not a ship of war before that is done—it is not within the Act before that is done, and the

alteration which is produced by giving it the means of propulsion simply, does not make it any more fitted out as a ship of war than it was before.

ARGUMENT.

1st Day.

Then, my Lords, another observation occurs to me, which is this. If building is not struck at by this Act of Parliament, it follows upon every sound principle of reasoning, that when you come to deal with words, such as "equipping, furnishing, fitting out, or arming," you must take them to be words *diversi generis*, as meaning something of a different kind, something not *ejusdem generis* with building. You cannot upon any sound principle of reasoning assign so capricious and so unmeaning an object to an Act of Parliament as to conceive that it does not strike at the building of the hull of a ship, but that it does strike at something, which is just of the same kind and character and nature as the mere building of the hull, and which is not connected in any way with hostile or warlike ship building. But if you adopt the argument that those words "equip, furnish, fit out, and arm" are all *ejusdem generis* amongst themselves, so that the character of the last will give a complexion to the whole of the four, then you at once get at an intelligible object, and an intelligible meaning on the part of the Legislature, namely, that it did not mean to prohibit mere building, that it did not mean to prohibit anything which was of the character of building, and as harmless as building is allowed to be, but that it did strike at something of a wholly different character, something that would turn the ship into a ship of a distinctively warlike character, and give it those attributes and powers which a ship fitted out for war would have.

Now, my Lords, I am still not approaching the words "attempt or endeavour," or "procure," or "be concerned in," but I am still endeavouring to find out what is the complete offence, if I may use the expression, which is struck at by this section; and as the result of my arguments as I have put them before your Lordships, abandoning for a moment the verbiage of the Act of Parliament, which really cumbers us, and abandoning also for a moment any question of attempt or endeavour, and pointing merely to the principal offence itself, I submit that the construction of the section, putting it in very short terms, is this; it is a prohibition to this effect; no person within Her Majesty's dominions shall equip a ship as a ship of war with a view to its being used by one belligerent against another. The ingredients in the offence therefore are threefold; first it must be committed within Her Majesty's dominions, second there must be an equipment as a ship of war, by which I understand an equipment of a warlike character.

*Mr. Baron Bramwell.*—Something short of arming.

*Sir Hugh Cairns.*—We say nothing of arming. I say an equipment of a warlike character; it may be short of arming. I do not even ask your Lordships to hold that it must be a complete equipment, that would lead your Lordships very likely into questions which it would be impossible to solve; for example, it might

ARGUMENT.  
—  
1st Day.  
—

be impossible to say when a ship was, more or less, completely equipped. What I say is this, the equipment which is to be complained of must be an equipment of a warlike character, otherwise you are not equipping the ship as a ship of war. The third ingredient is, the view or the intention that the ship should be used by one belligerent against the other.

*Mr. Baron Bramwell.*—The Act goes further than that; the words are, "cruise or commit hostilities."

*Sir Hugh Cairns.*—I said "use," my Lord, because there is no controversy about that part of it. I said "use" as a compendious term, to denote the kind of use referred to in the section.

*Mr. Baron Bramwell.*—Without wishing to help you, for of course you do not stand in need of it, I may remark, that it seems important to bear in mind when you use the expression "equipment," that it must be warlike equipment. It must be such equipment, one would think, that the vessel can cruise or commit hostilities.

*Sir Hugh Cairns.*—Certainly, my Lord, I meant to refer to those words "cruise and commit hostilities," as part of the words which give me a right to say that the equipments must be of a warlike character, because without those words I admit that other questions might be opened. And I also put out of view the case of a transport, because it is admitted that that point is struck out of any accusation against the ship with which we have to deal. But it will not interfere with my argument that the word "a transport" occurs in the Act, because, just as a ship of war must have the equipments which are distinctive of and peculiar to a ship of war, so a transport must have the equipments which are distinctive of and peculiar to a transport. But with regard to the words which *Mr. Baron Bramwell* has referred to, namely, "to cruise or commit hostilities," those words I rest upon as words entitling me to say that the ship pointed at in that alternative part of the sentence, must be equipped as a ship of war.

Your Lordships will observe that I am carefully avoiding putting the case as high perhaps as it might be put in argument, because I do not feel it necessary that I should do so. I might go as far as to distinguish and describe the equipment in another manner. I might say, it must be an equipment which will enable the ship to cruise and commit hostilities,—that is going further,—then warlike equipment alone would not be sufficient. I might go so far as to say, that the test to be applied to the equipment should be this,—that it must be an equipment which would enable the ships to cruise and commit hostilities; but it is not necessary to my argument to do so. I show, at all events, that it must be an equipment of a warlike character.

Now I ask your Lordships to observe how completely that description tallies, first with the history we have of the question, then with the American Act of Congress, and then with other parts of this same Statute. How does it tally with the history of the question? I showed you that before any Municipal Act had been passed either by America or by this country, proceeding

upon principles of international law alone, this was the test applied by the Government of the United States to the equipments of ships in their ports, which were lawful and those which were unlawful; those of a warlike character were declared to be unlawful, and those not necessarily and distinctively of a warlike character were declared to be lawful. How does it tally with the American Act? I pointed that out to you when I showed you that although the American Act gives power to certain officers to require a bond, or to detain a vessel upon suspicion, yet that power does not arise unless the person requiring the bond or detaining the vessel is able to predicate of the vessel, that she is an armed ship, or that she is a ship whose equipments are of a warlike character. How does it tally with the 8th section of the present Act of Parliament? That 8th section is a very remarkable section, it is the section which deals with the question of what is called in the marginal note "Penalty for aiding the warlike equipment of vessels of foreign states," &c. That 8th section says this: "And be it further enacted, that if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of His Majesty's dominions beyond the seas, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, shall, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war or cruiser, or other armed vessel which at the time of her arrival in any part of the United Kingdom or any of His Majesty's dominions was a ship of war, cruiser, or armed vessel in the service of any foreign prince, state, or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people, belonging to the subjects of any such prince, state, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any person or persons so exercising or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanor."

Now, my Lords, observe there the case that is supposed by that section; you have there a case as you had in the American Act, of a ship coming into a neutral port clearly being a ship intending warlike operations; there is no question about that, and no dispute about it. Is it deprived of all possibility of equipment? Not at all, the penalty is only then against the addition of any equipment for war, so as to augment the warlike force of the ship or vessel. Any equipment which is not an equipment for purposes of war, any equipment which is not to augment the warlike force of the vessel, is perfectly lawful. Yet the argument which I suppose will be urged by the Crown that the equipment by section 7 may be an equipment which is not warlike, will

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

land us in this absurdity, that in the 7th section you have a clause dealing with equipments generally, whether warlike or not, but in the 8th section, where, beyond all doubt, the ship referred to was exactly one of the very class which would be prepared to cruize and commit hostilities, you allow the ship to take in her equipment at a neutral port, provided the equipment be not of a warlike character.

My Lords, if I am right in saying that that is the principal offence consisting of these three parts, an offence committed in Her Majesty's dominions, the equipment being of a warlike character, or such as would enable a ship to cruize and commit hostilities, and the intent or object being that that ship should be used by one belligerent against another, let me now deal with the minor words, "attempt or endeavour" or "procure" or "be concerned in." Now, my Lords, I have a complaint to make here of the proceedings on the part of the Crown, which I think your Lordships will consider not without foundation. I certainly was very much astonished at hearing, or rather at observing in the notes, an observation of my learned friend the Attorney General in moving for this rule. One of the complaints of the Crown was that the learned Lord Chief Baron on the trial had not called the attention of the jury to that part of the Act of Parliament and the arguments founded upon it as to procuring and being concerned in, the equipment and so on, and I observe among the grounds upon which the rule was sought, this matter prominently put forward as among the heads of complaint upon which the rule is obtained.

Now, my Lord, I endeavoured to refresh the recollection, which was very strong in my own mind, of the course which was taken by the late Attorney General at the trial, a course which was not misunderstood then, but was accepted by the other side as a convenient, and indeed under the circumstances of the case, the necessary course, and which I will contrast with the complaint that is now made by my learned friend the present Attorney General. What did the late Attorney General say in his opening? Your Lordships will find it in the book before you at page 12. It is the second break in the page. The learned Attorney General speaking of the information says, "The information as my Lord knows by this time is a very voluminous document. In truth neither you, gentlemen, nor any one else, unless my learned friends on the other side think proper to embark in the affair, no one need trouble themselves about the lengthy information, or the multitude of counts contained in the document. The number of counts, as my Lord will understand, is rendered necessary, or prudent at all events, by the very numerous words of description of the violation of the statute which occur in the section on which it is rested. You will find that a person shall forfeit his ship, who without licence of the sovereign shall equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the



ARGUMENT.

1st Day.

“equipping, furnishing, fitting out, or arming of any ship or vessel with a certain intent; therefore, as a matter of prudence, (and I will pass from this part of the case in a moment,) it became right with us to put what I may call the complaint or accusation in various forms, so as to bring the case, supposing the facts proved to your satisfaction, clearly within the language and terms of one part of this section or another. Therefore we shall have no complaint about the length of the information. The truth is, as my Lord will observe, the first eight counts are those only to which any attention need to be paid. They merely vary one from the other, and the others are changes rung upon those by reason of the various expressions I have read.”

*Mr. Attorney General.*—Will you have the goodness to read what is at the bottom of that page?

*Sir Hugh Cairns.*—If my learned friend wishes it I will read it at any length; at the same time I take the liberty to say that nothing which comes afterwards could qualify that statement made by the Attorney General that those eight counts were those to which only any attention need be paid. Now I will read what is at the bottom of the page:—“Now, that information being filed, the complainants, who have been permitted, as I told you, to appear, deny the existence of those various causes upon which the Crown relies as having induced the forfeiture, and your duty to-day is to try, whether in substance and in fact, these causes or any of them, any material causes within the section to which I have referred, did exist at the time of the seizure, and warranted the seizure that took place. Gentlemen, the charge, as you may infer from the reference I have just made to the language of the 7th section, is in fact this,—that the ‘Alexandra’ was fitted out, or if the term be preferred, equipped, or was permitted to be equipped, or that persons endeavoured to equip; they are the various forms, but I rather prefer to rest on the main expression, that it was fitted out and equipped, or that endeavours were made to equip, with intent to be employed to harass and to be hostile to the Government and citizens of a State with which Her Majesty was not at war, the State of the United States.”

Now, my Lord, I repeat that observation; I do not mean to say that the learned Attorney General in form abandoned the other counts of the information, but I say that he clearly and distinctly announced to the learned Judge presiding at the trial of the case, and to the counsel on the other side, this: My idea of that which in substance we have to try is, that you will find it in those eight counts. No doubt I shall have the liberty if I see clearly and distinctly, if I am ousted from those eight counts, that I can bring the case hereafter under another one, to try to do so, and I shall claim that liberty; but I tell my Lord, and I tell the opposing counsel, that until I warn you to the contrary, what we have to direct our attention to, is that part of the information, namely, the eight counts. Those eight counts are

ARGUMENT.

1st Day.

upon the "equipping" and "furnishing," and "fitting out," "and not upon the "attempting," or "endeavouring," or "pro-curing," or "being concerned in." As your Lordships cast your eyes over the different counts, you will see the difference which there is in them. The first count says "did equip," the second count says also "did equip," with a certain other intent; the third says "did equip," again; the fourth says "did equip," the fifth "did equip," the sixth "did equip," the seventh "did equip," the eighth "did equip," And then we have a *résumé* at page 5 of the other counts; the 9th to the 16th substituting "did furnish" for "did equip," the 17th to the 24th substituting "did fit out" for "did equip," and so on.

Then, my Lords, I will show your Lordships how this view was accepted by the other side in a moment. But at a later period and before the case of the Defendants was opened at all, my Lord Chief Baron again asks the Attorney General at page 68 in the large book, "How many counts are there?" "*Mr. Attorney General.*—There are 98 counts, but the first 8 counts disclose the whole of the pleadings; the other counts vary only in taking the words of the statute, such as 'equipping,' 'fitting out' and 'endeavouring to fit out' and the like. The first 8 counts are the only counts that any one need pay the least attention to upon this point, and the first count raises this question as to the names." Was that misunderstood on the other side? When the case of the Defendants began to be opened, this is the statement which, as counsel on behalf of the Defendants, I made in answer to the proposition or statement of the learned Attorney General. Your Lordships will find it at page 139 of the same book, just at the bottom of the page.—The Attorney General says, "We will not stand on any count which describes the intention to have been that this should be used as a transport or store-ship. We have not so opened our case." To which I said, "I did not suppose that my learned friend so considered it; only, in order to prevent misconception hereafter, I mention it now. I come now to the main counts in the case, which my learned friend said very fairly might be judged by the first eight counts of the information, the others repeating the same idea in different forms of words."

Now do not let it be supposed for a moment that I mean to say the Attorney General abandoned or could not have relied upon, if necessary, the other counts of the information; but I say, if, after that, a complaint is made of the ruling of the learned judge who presided at the trial, and it is meant now to be urged in opposition to anything which was argued at the trial,—We have not got a case; we admit we have a difficulty in supporting a case with regard to equipping; but we ask you to look particularly at a wholly different offence, at an offence described in a wholly different way, viz., the being concerned in the equipping, and to hold that our evidence goes to that; then I say it was the bounden duty of the Attorney General to say, if he had so intended—but he never intended anything of the

kind:—"Do not let my Lord be misled—or the counsel on the other side, or any one—be misled by supposing that any one of the eight counts represents clearly what was the *gravamen* of my charge; for it is to be found in a different count. I ask your Lordship's attention to that, and I call upon the other side to meet that case in point of argument." Nothing of the kind, however, was said. The matter was left in the way I have stated, and in no other way.

ARGUMENT.

1st Day.

*Mr. Attorney General.*—I should be very sorry, without sufficient cause, to interrupt my learned friend. But not only are the interests of truth and justice at stake, but also the reputation of my learned friend the late Attorney General is concerned in what has just been said. If you will look at the 199th page, you will see what the Attorney General said in his reply. It is this: "My Lord, there are other material words to which I will call your Lordship's attention. It is not only a violation of this section that a person shall equip, or fit out, or arm, or furnish; but if he shall attempt or endeavour to do so, or shall procure the thing to be done, or shall knowingly assist or be concerned in aiding with the intent. Therefore any one of those, or the endeavour, or being concerned in the attempt to do any one of those, as I submit to your Lordship clearly on the terms of this section, would bring the case within its operation. That would be a matter for your Lordship's direction to the jury."

*Sir Hugh Cairns.*—I am much obliged to my learned friend for any interruption which enables me to have what I should not otherwise have, viz., some power of answering the statements of my friend. And first I take leave to say that the reputation of the late Attorney General is not involved in this question. His reputation desires and requires no argument from either me or my learned friend. He, I have no doubt, were he here, would deal with this case as I desire it to be dealt with. I say it was impossible for the late Attorney General after opening his case as I say it was opened, after calling upon us to meet the case as it was opened, after I was heard on the part of the defendants, and after our mouths were closed, to put the matter in a new condition by his reply. And even if those ambiguous words fell from the Attorney General which my learned friend has just read, I care not for them. I say the matter was clearly put between us in his opening and in my observations for the defence; and I say it was not consistent with the course the Crown ought to take to attempt to open a new case in the reply on the part of the Crown. But, my Lords, the late Attorney General was perfectly well aware, and we shall find that he could not be otherwise than well aware, that it was as it appeared to him to be at the first, utterly immaterial to rest upon these other words, and I say now that if the case had been opened in any way,—if these words had been made distinctly at first the *gravamen* of the charge, it would not have bettered the matter in the least, as I hope shortly to be able to convince your Lordships.

ARGUMENT.

1st Day.

Now I will deal with these minor words. What are they? They are, in the first place, to "attempt or endeavour to equip;" secondly, "procure to be equipped;" and thirdly, "knowingly "aid, or assist, or be concerned in equipping." Now, at this branch of the argument, I am entitled to assume, that the view I have submitted of the principal offence is the correct one, otherwise, of course, it would not be necessary to go into the minor ones; but I will assume now, that the principal offence is an offence so constituted, that is, an equipping within Her Majesty's dominions in a distinctively warlike manner, a ship to be used by one belligerent to cruise and commit hostilities against the other. Now let me take, first, "an attempt or "endeavour" to do that. What does that mean? Does it mean an attempt or endeavour to do that out of the jurisdiction. It must, of course, be an attempt or endeavour to do the act, which if it had gone on to its consummation, would be the offence described in the earlier words of the section. If the offence described in the earlier words of the section be to equip in a distinctively warlike manner within the jurisdiction a ship or vessel to be so used, the attempt or endeavour must be shown to be to equip in that distinctively warlike manner within the jurisdiction that ship or vessel so to be used. Now, I will show your Lordships, when we come to the evidence in this case, that it never was once suggested that beyond that which was actually done upon the ship "Alexandra" at the time of seizure, there was a grain of evidence going to show that anything of a different character, anything *diversi generis*, was to be done to the ship before she left the jurisdiction; and I say that advisedly, bearing in mind that there was an attempt made, with which I shall qualify my statement, to show something about guns to be put on board, which was given up by the Attorney General at the trial, but which I will deal with as the present Attorney General has now renewed the charge. But, putting that out of the case, I say it carries the case not the least further. If you rely on an attempt or endeavour, you must show that the attempt or endeavour was to do that particular act which if the attempt or endeavour had not failed or been interrupted, would have been the offence intended by the Act of Parliament.

To explain my meaning, I will suppose that there is a ship at the wharf in Liverpool. Up to the point at which I speak of her, she has received no distinctive or definite armament for war; but there are coming down one of the streets of Liverpool a number of heavy waggons laden with guns and gun slides, and other distinctive equipments for war, as to which I show that it was intended clearly to put those guns, and other warlike equipments, on board that ship; and I prove by evidence about which there is no doubt, that John Smith was the person controlling that operation, ordering and directing those waggons, and that he intended to put those warlike armaments on board the ship, and that all that was done of course, I assume (I do not repeat it at every turn) with the intent

and object that the ship should be employed by one belligerent to cruize and commit hostilities against the other. But something happens to stop the progress of the waggons; either an officer of the customs is premature, or something else occurs; the whole are arrested; the guns never reach the ship. But the evidence is clear that if not arrested they would have been put on board the ship. I say there, that that was clear evidence of, and all that was meant by, an "attempt" or "endeavour." If there had been no interruption, if the waggons had gone their course, and the guns had been put on board, the offence, I will not say would have been complete, but would have come under the first category; as being an equipment of a distinctively warlike character, it would have come under the first section of offences. It has not been completed; it was arrested and stopped, but the evidence shows that it was only owing to the casual circumstance of its having been arrested that it was not completed. That is an attempt or endeavour, and that would be an indictable offence under the Act. Your Lordships will judge whether, if it had been made a point of by the late Attorney General, there was a grain of evidence to show that anything of the kind occurred in this case.

*Mr. Baron Bramwell.*—To do the thing, and to attempt to do it, cannot be two offences. Surely a man cannot be guilty of the two offences, attempting to do it, and then doing it if he succeeds in doing it; why? not because the first is pardoned by the commission of the second, but for this reason, that if he does it, he commits one offence, and the Act of Parliament says that if he attempts to do it and does not succeed he commits the offence also.

*Mr. Baron Figott.*—The attempt is the same if he does not accomplish the object.

*Sir Hugh Cairns.*—The attempt was the same up to the point where the attempt was arrested; his purpose and object was just the same as that of the man who completes the offence. Well, as to the next, "aiding and procuring to be equipped," that is *qui facit per alium*, &c.; he commits the offence in that way. He does not do it by his own hand, but he procures the complete offence to be committed.

*Mr. Baron Bramwell.*—But for that this sort of point might arise, that a man could not be said to do it if he had contracted with another person to do it for him, because that person though in one sense he might be an agent, might in another sense not be so. A contractor might have a right to say I will do that in my own way, and to avoid any question of that sort the Legislature says,—If you procure it to be done you shall still be taken to have committed the offence.

*Sir Hugh Cairns.*—Yes, that would be the second point. Then the third is "who shall knowingly aid or assist, or be concerned in the equipping, furnishing, or fitting out, or arming of any ship or vessel," what does that mean?

It means being concerned in either that which has gone on to

ARGUMENT.

1st Day.

Argument.

1st Day.

completion, and is the complete equipment, or that which would have gone on to completion if it had not been interrupted, but which was intended to be the complete equipment which is struck at by the Act. And your Lordships will find, if that is the true construction, that the whole course which was taken by the late Attorney General at the trial is perfectly clear and perfectly accounted for the course that was followed by the learned Lord Chief Baron in his charge,—that no person suggested that as distinct from what was found on the “Alexandra” at this time, as to which there was no controversy or argument, there was something which never had got to the “Alexandra” apart from the guns, which was a point given up at the time.

*Lord Chief Baron.*—There was no evidence establishing the point as to those guns, the Attorney General at last gave that point up.

*Sir Hugh Cairns.*—Yes, my Lord; he gave it up.

*Lord Chief Baron.*—He said the evidence failed,—there was no evidence that the guns were to be put on board at Liverpool.

*Sir Hugh Cairns.*—No, my Lord; not the least,

*Lord Chief Baron.*—It might be matter of supposition that the guns were to go in another vessel, and that they were to meet somewhere else.

*Sir Hugh Cairns.*—There was no evidence, as I shall submit to your Lordships by and bye, that the guns were ever intended for this ship, but on the contrary, there was the very strongest evidence that they were not intended for the ship; but in addition to that, there was not a particle of evidence that it was intended to put on board any guns in Liverpool.

*Lord Chief Baron.*—I certainly should come to the conclusion that very likely the vessel was to be sent somewhere else out of this country, and that the guns were to be sent by another vessel, and that the guns were to be put on board the “Alexandra” in some other port, not a port of this country, or in any other part of Her Majesty’s dominions.

*Sir Hugh Cairns.*—As I shall submit to your Lordships by and bye, there was really not a particle of evidence upon which an opinion even could be formed upon the point; but it was idle to suppose that there was any evidence which could be rested upon to show that if there was not what is meant by the equipment in the first part of the section, there was anything short of that upon which any one could be called in question.

*Mr. Baron Bramwell.*—What a strange thing it would be if it were otherwise, because the ship is to be forfeited if any one of the offences is committed. Then some man might be guilty of assisting, although the owners to whom the ship belongs are not guilty of equipping. Then because, in some way or another, which I own is inconceivable to my mind, some one is guilty of assisting

although the owner is not guilty, the ship is to be forfeited. All that was intended to be comprehended was this,—supposing a man were to say this, “I really was not engaged in fitting it out. I was only the smith,” and another man says, “I am only the carpenter;” although they were helping knowingly, it was intended to evade the sort of argument that might be used when people were informed against under this Act of Parliament and proceeded against by information. “I am not the single person who was doing the entire thing.” It is answered thus: “But you were assisting at it, and the thing was to be done.” It seemed to me, with great respect, that that is the reason why the Attorney General treated the question in the way he did. You know, Sir Hugh, one is desirous to pay every attention and respect in a case of this kind to the American authorities, and it does strike one, although you said that a good deal of rubbish had been spoken about this matter, there is an American authority the other way; I mean the one you have cited already; one where it was held that the principal actors must be guilty in conjunction with each other.

ARGUMENT.

1st Day.

*Sir Hugh Cairns.*—That is the Quincy case.

*Lord Chief Baron.*—That is very easily explainable, assuming that the offence consists in equipping and furnishing; I use those words as one would X and Y; a man is guilty of the offence who assists in doing one, if the intention is ultimately to do both. It seems to me that there can be no doubt about that.

*Sir Hugh Cairns.*—Yes, but it might well be with regard to the persons assisting, taking the case of the blacksmith or the carpenter separately, that one might be assisting in one operation and the other in the other, although as regards the principal actor you must show that he has intended to do the whole complete and entire act. Now my lords I must dwell a little longer on this point for another purpose. I know not whether an argument which I collect from an expression of the Attorney General in moving for this rule, is to be urged by him on the present occasion. From the note I have read, I collect the argument, and I will take leave to read it to your Lordships. I may be wrong, but it certainly does seem to me to contain a proposition of the most startling character in reference to this Act of Parliament that I have ever read. The Attorney General, in moving for the rule, said this upon the point I am now dealing with. He said, “Not only is the attempt or endeavour struck at, but anyone ‘who shall knowingly aid, ‘assist, or be concerned in the equipping, furnishing, fitting out, ‘or arming.’ Now that is a clause which is remarkable because it strikes at the case of a person within Her Majesty’s dominions, knowingly aiding, assisting, or being concerned in the equipment, whether or not the equipment takes place *quoad alios* elsewhere.”—This is the most startling proposition I ever heard of. I do not know whether the Attorney General on reflection will venture to argue in favour of that proposition, but

ARGUMENT.  
1st Day.

his argument in moving for the rule was that by the force and virtue of these words, "be concerned in aiding and equipping" if you get a person knowingly assisting in Her Majesty's dominions in that which is to be the equipment of the Ship, it is no matter if the equipment is *quoad alios* to take place elsewhere.

*Lord Chief Baron.*—Where do you cite that from?

*Sir Hugh Cairns.*—From the short-hand writer's notes of the argument, your Lordships will find it at page 54 of the printed book; I will read the full passage: "The statute desires to stop the thing *in limine*, to cause the thing not to be done; and therefore, instead of stopping at these words, it goes on, 'or attempt or endeavour' to do any one of these things; so that however little progress may have been made, and in whatever imperfect condition the ship may be as to these things when she is seized, if any step has been taken which is an attempt or endeavour to do any one of these things, provided it be a prohibited attempt, it is struck at; and not only the attempt or endeavour, but any one who 'shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming.' Now, that is a clause which is remarkable, because it strikes at the case of a person within Her Majesty's dominions knowingly aiding, assisting, or being concerned in the equipment, whether or not the equipment takes place *quoad alios* elsewhere. Any person who does any one of these things within Her Majesty's dominions offends against the Act; that is to say, any one who equips, who attempts or endeavours to equip, who procures to be equipped, or who knowingly aids, assists, or is concerned in the equipping wherever the equipment is completed, and who ever be the person by whom it is made." Now, my Lords, if the Crown is going to argue this—

*Lord Chief Baron.*—I think there cannot be a doubt that before you talk about attempting, endeavouring, aiding, or procuring, or anything of that sort, you must first see what is the offence created by the Act of Parliament; what is the act that is not to be done. Then, when you have ascertained what that is, there can be no doubt that to aid or abet in that, to procure that, to assist in that, and so on, is a minor offence against the same statute, but it does not create a new and different one, and I own I think there was a great deal of mistake on that point, and much confusion has arisen from the act itself, and the attempt to do it being put into different categories. I called your attention very early to-day to that distinction. I said, Let us know what we are to understand as the act forbidden, because to assist, to aid, procure, or order, and so on, in any other matter than that which is forbidden is no offence at all; and therefore it was that I put the question to the jury: "Do you believe that this vessel was intended before it left Liverpool or any other port of Her Majesty's dominions to be in such and such a condition, either equipped or armed, because if that was not intended then all the assistance and so on is nothing." It was admitted the vessel was not completed. I



said, if it was not intended to put the vessel into a condition so as to commit the offence which the Act was made to prevent, all the attempts are of no importance.

ARGUMENT.

1st Day.

*Sir Hugh Cairns.*—I should beg leave to illustrate it in this way to meet what I understand to be the argument of the Crown, intimated in the words I have read. Suppose the case of a ship clearly and admittedly unequipped, unfitted, and unarmed, but built within this country.

*Lord Chief Baron.*—Allow me to say that there is an omission in a part of my summing up which seems to have led to some mistake. I think the late Attorney General very much misunderstood it, but everybody who read it with the smallest portion of candour, must, I think, perceive that the word “if” has been left out. I am made to say this “Because, Gentlemen, I must say it seems to me that the “Alabama” sailed away from Liverpool without any arms at all, “merely a ship in ballast, unfurnished, unequipped, unprepared, “and her arms were put in at Terceira, not a port in Her Majesty’s dominions. The Foreign Enlistment Act is no more “violated by that than by any other indifferent matter that might “happen about a boat of any kind whatever.” All that was prefixed by the word “if.”

*Sir Hugh Cairns.*—Yes, it was one sentence prefixed by the word “if.”

*Lord Chief Baron.*—I must say it seems to me that “if the Alabama” is how it should be read; and I think that no person reading it with any candour would suppose that I had taken on myself to say that the “Alabama” did all that, because I knew nothing about it; there was no evidence about it.

*Mr. Attorney General.*—We all understood your Lordship so.

*Lord Chief Baron.*—It is very obvious what I mean.

*Mr. Attorney General.*—It is merely a clerical error.

*Sir Hugh Cairns.*—It is correct in one of the copies.

*Lord Chief Baron.*—If I had known that it had appeared in either copy, I certainly would not have said a word about it; for the accuracy of the report is really highly praiseworthy.

*Sir Hugh Cairns.*—Your Lordship will find it at page 245 of the smaller copy.

*Mr. Attorney General.*—Your Lordship will remember that I read from the smaller copy when I moved for the rule.

*Sir Hugh Cairns.*—You will see, my Lord, it is not only that you said “if” but you said “if it were true that.”

*Lord Chief Baron.*—Yes.

*Sir Hugh Cairns.*—Now, my Lords, I have adverted to this suggestion which I should hardly think was gravely made by my friend in moving for the rule. If it were, all I should say is this, that the case I understand to be put there, is, the case of a person labouring upon or engaged upon those things which are to become the equipments of a ship, and those equipments being put on board a ship, not in Her Majesty’s dominions, but elsewhere. I venture

**ARGUMENT.**

**1st Day.**

to say that it is the wildest proposition that ever was contended for to say, that that can be struck at by the Foreign Enlistment Act under those words, "being concerned about the equipping"—the meaning of which is being concerned about that kind of equipping which if actually perfected would be an offence within the first part of the section, namely, equipping in a warlike manner within Her Majesty's dominions.

Now I said that I would ask your Lordships to consider for a moment what has been the kind of argument brought to bear on the construction of this statute not so much in Court as out of Court, the argument which is conducted by putting extreme cases, and I am now, my Lords, not dealing with that which perhaps may be called the more flexible principle of international law generally, but with the strict and hard words of a Municipal Act of Parliament, and above all, (I need hardly remind your Lordships of that which is obvious on the face of it,) an Act of Parliament creating a misdemeanor—a novel misdemeanor which was never before the subject of legislation, and not only so, but an Act of Parliament creating, in addition to the misdemeanor, a forfeiture of property which may be very valuable, and which, in one reading of the Act of Parliament, may be forfeited occasionally in the hands of a person entirely innocent of any offence. But even on the ground of this being an Act of Parliament creating a misdemeanor it would have to be construed in the strictest and most literal sense of the words. What is the sort of extreme case put to test the applicability of this Act of Parliament? I will take the case which was repeated to-day by Mr. Baron Bramwell of two ships, the one a ship destined ultimately to be equipped out of Her Majesty's dominions, the other bearing on board the warlike equipment to be put on board the first ship, the two lying side by side in one of our docks, the two leaving together, sailing together, and passing together out of the neutral territory, and then for the extreme case supposing this, that immediately outside the neutral ground a transfer is made, and all the equipments which are in the one ship are put into the other, and she thereupon becomes an equipped ship or vessel of war. Well it is said, would not this be an evasion of the Act of Parliament? Now, when I speak of the Act of Parliament, I certainly do ask your Lordships to consider what is the meaning of an evasion. When I speak of an evasion, I understand it to be the avoiding the committing an offence laid down by the Act of Parliament; and why a man should be punished for avoiding committing the offence is one of those things that I cannot understand. The question is, Has he committed the offence? If he has committed the offence, let him be punished; but if not, why should he be punished for avoiding or evading the commission of the offence? Let me deal with an argument of that kind in the way that it ought to be dealt with, namely, by putting extreme cases to test it on the other side. In the first place I must observe that this is a practical Act of Parliament, I hope, or at least that it was intended to be so, and the extreme case which is sup-

posed is not a practical case, because we know very well that in practice it would be an operation attended with very great difficulty and danger, and in most cases not possible at all on the high seas to transfer to an unequipped vessel the equipments destined for her which are to be put out of another vessel. We know that in practice an operation of that kind must be conducted in a port, and persons would be out of their senses to attempt to conduct the operation on the high seas, and I do not suppose that such a case could be found.

ARGUMENT.

1st Day.

*Mr. Baron Bramwell.*—Except that of the “Alabama.”

*Sir Hugh Cairns.*—No, my Lord; that was in port. It is in evidence in this case, fortunately, that she was equipped at the Azores.

*The Attorney General.*—Not in port.

*Sir Hugh Cairns.*—She was in a roadstead, if not in port. If she was not in a port, she was in a harbour or roadstead, which is the same as a floating dock. However, I shall have something to say about the “Alabama,” and the view of the Attorney General on the subject of the “Alabama” too. But in the next place I say that this is matter of positive law, and draw the line as sharply as you please, the more consistent will it be with the construction of an Act of Parliament of this kind, which is to fetter and restrain the liberty of the subject and create a misdemeanor and forfeiture, to hold that the line is to be drawn sharply, strictly, clearly, and distinctly. If you once get to this, that there is one thing on one side of a line and another thing on the other, that is exactly the way an Act of Parliament of that kind ought to be treated. There ought to be no reasoning about it; the Act of Parliament ought to say what is an offence and what is not, and when you get at that by legitimate construction you must observe that line, and you are not at liberty to wander into pre-conceived ideas as to what the spirit of the Legislature might be, and say that the words are intended to be extended to meet possible cases, because the words literally do not meet, or do not deal with those cases.

*Lord Chief Baron.*—In other words, Sir Hugh, there is no equitable construction of an Act of Parliament creating a crime?

*Sir Hugh Cairns.*—There is none, my Lords.

*Mr. Baron Bramwell.*—I assure you I would rather hear you than myself, but I have a thing in my mind that I should like to have cleared up. I quite agree with you as to what you have said about the word “evading.” I remember hearing Lord Cranworth say that it was rather an uncivil way of speaking to say that a person had evaded infringing an Act of Parliament. I did not use the word “evade” with regard to this Act of Parliament.

*Sir Hugh Cairns.*—I am aware of that, my Lord.

*Mr. Baron Bramwell.*—Well, there is another thing. You say there is a line to be drawn. I quite agree that there is a line somewhere to be drawn, but we may always say this, that although there is a difficulty in saying where the line is to be put, certain cases may be clearly on one side, and that the wrong one. But

ARGUMENT.  
 1st Day.

it might be said that where substantially the vessel to be fitted out and equipped has the protection of, I will not say the *præsidia*, but the protection of the port or territory of the neutral, that tically there it is an infringement of this Act of Parliament, although the final equipment may be out the territory. You know the way in which we should solve that difficulty. We should leave it to the jury, and say, "Substantially, do you find "that this is within the protection of the neutral territory?" and the jury might answer, that according to their view it was so. How far that would extend to—whether one ought to leave it to the jury—that the vessel must have gone three miles, or whether one ought to say that the vessel must have gone 100 miles I do not know, but I cannot conceive that it would be a correct leaving (I do not say it is; I want you to tell me that. I ask, would it be a correct leaving) to say to a jury, If you are of opinion that substantially it was within the territory, or under the protection of the territory, or within the influence of the territory of the neutral that this thing was done, that then it was an infringement of the Act. What I want to know is, would that be correct? I do not mean to say in those words, but in any form of expression leaving it to the jury to say, Do you find that substantially it was by means of the territory of the neutral that this thing was done.

*Sir Hugh Cairns.*—I will tell your Lordship very frankly, if you will permit me to do so, what occurs to me upon that point; I apprehend that what the jury must make up their mind about is this, what is the equipment? Was the equipment of the vessel, the preparation in the workshops of the port of this or that thing, afterwards to be put on board the ship, the intention being all along that they never should be put on board within the limits of the neutral territory. Was the equipment of the ship, the construction within the workshops of the port of those articles which were never to be put on board within the dominions, or was the equipment the transfer when the ship has passed out of the dominions into the high seas or some other place? Which of the two is the equipment? They cannot both be equipments? One or other must be the equipment in question. Can it be said that the fabrication of a gun carriage in a workshop in the neutral port, there being no intention to put that gun carriage on board the ship, and it being proved that there was no intention to put the carriage on board the ship within the neutral territory, is an equipment of the ship within the neutral territory? It would be idle to say so. Then can the transfer outside of the neutral territory, however easily performed of the one to the other, be an equipment within the territory? I should apprehend that it would be a contradiction in terms to say that it is.

*Mr. Baron Bramwell.*—May the ship not be furnished? Take the case of a steam tug lashed to her side, and towing her out, and the steam tug having on board the armament, would you not say that that vessel had been furnished within the neutral territory?

*Sir Hugh Cairns.*—I am much obliged to your Lordship for supposing that, because it leads me to one of the cases which I am going to put to your Lordships. Supposing it was suggested that the preparation within the dominions of an armament for a ship is the furnishing of that ship with the armament, and that therefore the mere preparation is sufficient, there being no intention to put it on board within the dominions; that is the case your Lordship supposes?

ARGUMENT.

1st Day.

*Mr. Baron Bramwell.*—Yes.

*Sir Hugh Cairns.*—Would not that argument equally apply if the armament were provided within the jurisdiction for the ship although the ship herself never came within the jurisdiction; although the ship was lying outside, never in the jurisdiction; although there was no ship to be forfeited, attached, or arrested. It would be equally true if that were the construction to be put on the word “furnish,” if you found the case of a man within the jurisdiction furnishing, preparing, and getting ready a complete armament for a ship which herself never came into the jurisdiction at all. It necessarily requires the connexion of the two, and the mode in which that connexion must take place is evidenced by the use of the terms “equip,” “furnish,” or “fit out” a ship, the whole representing a work to be performed upon the ship. The ship is to be seized with the tackle and furniture which belong to her or which you find on board the ship or vessel, and the whole is represented as a work done within the dominions, and which would enable her to go out with that work on board.

*Mr. Baron Bramwell.*—I think I might say “I am furnished with arms,” and if a person were to ask “Where are they?” and I were to reply “My servant is here, and he has got them,” that would be a correct expression, but it would not be a correct expression for me to say, “My servant is coming to meet me; he will be here in half an hour, and I am furnished.” I ought to say, “I shall be furnished.” A vessel leaves her port with another vessel, carrying the arms by her side. I quite agree as to the vessel lying outside the port. Pray do not suppose I have any opinion about the matter. I have not, indeed.

*Sir Hugh Cairns.*—I rather think your Lordship would not be of that opinion. You are kind enough to put the case for me to consider, but what I desire to show is this: Let us disembarass the case of that which has the aspect of producing a result, in point of argument, when it really has not. Let us abandon the argument or the idea of the ships being lashed side by side, for that can make no difference. I will take the case of the ship I supposed built at Southampton, but unequipped, and sailing from Southampton. It turns out to be desirable to have the armament of that ship prepared at Birmingham. The object and intention of every one is proved to be to tow the hull of the ship over to Brest, to ship the armament at Liverpool, and to carry it round by sea to Brest. According to what your Lordship suggested as

**ARGUMENT.**

**1st Day.**

the possible interpretation, it would be just as correct to say in that case that that ship was furnished with the armament because it was known that at Birmingham there was an armament prepared ultimately to be brought on board the ship. Just as your Lordships said in the case of the servant you would say in that case, Here is a ship which by licence of expression is furnished with an armament, that is to say, an armament is constructed which is ultimately to be brought round to some place and to be put on board. But could it be contended there for a moment that in the words of this Act of Parliament the preparation of that armament in Birmingham, which never is to touch the ship here, but which is to go to Brest for the purpose of being furnished, is an equipping within the misdemeanor or a fitting out or a furnishing or an arming of the ship with this particular intent, creating a misdemeanor, and leading to the forfeiture of the ship or vessel with furniture, equipment, and tackle and apparatus on board. My Lords, I apprehend that the case is not bettered at all if in place of taking Birmingham we take the case of an armament provided and put on a ship, the ships being side by side. The contact of the two is the thing stuck at. There is no contact or equipping in the sense of the Act of Parliament unless the contact is made out to occur within the jurisdiction.

Then I ought to advert to another matter which your Lordship was good enough to suggest, namely, the protection of the neutral territory. Now, my Lords, that again is a matter which it would be very difficult to apply as a test, or as a rule, for a question to be put either to a jury or to be applied to the construction of an Act of Parliament. As regards a country like England—an island State—of course there is a great waste surrounding her of open sea which a ship has to traverse; but among the many nations between whom this Act would have to be applied, it might well be that a State was divided from another merely by a river, and that there would be no possibility in practice in some cases of a belligerent having the opportunity of that waste or intervening space in which a ship might be captured or arrested. And yet it could hardly be said that a work, because it was done under the protection of neutral territory, was to be judged of in a manner different from the manner in which we should judge of a work done passing out of our territory into the high seas. I was going to submit to your Lordship an example of a very sharp and hard case under the same section. Let me take the alternative about delivering commissions. “Or shall within the United Kingdom or any of His Majesty’s dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor.” You may say, surely it is a most extraordinary, capricious, and whimsical thing, that a natural-born

subject of Her Majesty, who is responsible for his acts wherever he may be, shall, if on one side of that line which constitutes the limits of Her Majesty's dominions he delivers a commission, be guilty of misdemeanor, but if he delivers the same commission on the other side of the line, he is perfectly free, and not culpable in any way whatever. Yet so it is. It may be very sharp, but that is the offence. There is no offence, unless you prove to the letter that it is done within the jurisdiction, just as it is asserted in this information that the whole of the equipment took place within the dominions of Her Majesty. Again, one must always remember that the power of the belligerent in this case comes up to just as sharp a rule and as sharp a case as the case I have supposed. For instance, as I supposed that the ship unarmed and unequipped may pass beyond the neutral line, and then be equipped, wherever the equipment may come from, so I suppose on the other hand, and assert, that the belligerent if he is on the watch,—the adverse belligerent,—may bring his ship of war up to the neutral line, and the very moment,—the very instant,—the ship which is to be equipped passes that line, that very moment while it is yet unarmed and unequipped, and while it is totally incapable of any sort or kind of resistance,—the belligerent has it in his power having waited there, expecting its arrival, to arrest it when it comes, and take it while defenceless.

*Mr. Baron Bramwell.*—If I am not mistaken, you can tell me this. I should imagine that the belligerent ship of war might make a third in the party, I have supposed, and go out with them. The 24 hours' start would not apply there.

*Sir Hugh Cairns.*—No, because it was not a ship of war; the 24 hours' start would not apply in that case, because the ship going out unequipped is not a commissioned ship of war.

*Mr. Baron Bramwell.*—That is according to the hypothesis?

*Sir Hugh Cairns.*—Yes, my Lord, *ex hypothesi*. Therefore I am not at all prepared to suggest that your Lordships' question is not entirely to be answered in the affirmative, and that it might not become a party of three; the rival belligerent going out in the company of its two companions, and falling upon them and taking possession of both of them—taking possession of the one because she had contraband of war on board, and taking possession of the other, because it was a ship going to be equipped with those articles of contraband, and therefore being contraband. My Lords, as I have gone perhaps out of any argument which has yet been suggested on the other side, as to these extreme cases, I might take notice of an utterance which I do not think dropped from the Attorney General, but which is very commonly used, and which perhaps may find utterance in this court before the argument is over, about the intention and object in all these cases being that our ports should not be used as arsenals for one of the belligerents. Now that is a very inaccurate expression also.

ARGUMENT.

1st Day.

ARGUMENT.

1st Day.

*Lord Chief Baron.*—Sir Hugh, if you are going into a new head of argument perhaps we had better stop here, as my brother Bramwell is about to retire, and it is very nearly 4 o'clock; there is a considerable want of light, and if it is not inconvenient to the bar, we shall sit to morrow at 10 o'clock precisely instead of half-past 10.

*Sir Hugh Cairns.*—If your Lordships please.

*Lord Chief Baron.*—I hope that is convenient to the bar.

*Mr. Attorney General.*—Most convenient to all of us.

---



## ARGUMENT—*continued.*

---

**SECOND DAY.—Wednesday, 18th November 1863.**

---

*Sir Hugh Cairns.*—My Lords, the question which I was taking leave to consider yesterday when your Lordships adjourned was, whether supposing you could show in point of evidence that there being in this country a ship wholly unarmed and wholly unequipped it could be proved that there was a certain equipment and a certain armament prepared and made ready for that ship, and as it were ear-marked, set apart in some store or repository, and supposing at the same time you had conclusive and distinct evidence that there was no intention to put that equipment or armament on board in this country, but on the contrary, that the intention throughout was to put it on board out of the Queen's dominions,—whether that would be an equipment or a furnishing or a fitting out or arming of the ship within the Act of Parliament. My Lords, that was a question put by way of suggestion by Mr. Baron Bramwell, to which I was addressing myself. Now, before I part from that, in addition to what I remarked yesterday by way of argument, I would ask your Lordships to test that question in this way. Suppose that an indictment under this Act were framed under such circumstances, an indictment with reference to the arming of the ship, of course you would be obliged to allege that the person indicted did, within Her Majesty's dominions, arm a ship or vessel of such a name with the intent which is mentioned in the Act of Parliament; how would that be supported? Would it be supported by proof of this kind; not that there was any armament put on board the vessel, but that there was a particular store or repository in Her Majesty's dominions within which there had been prepared and set apart a certain armament destined for the ship; but the evidence showing at the same time that the intention was to put that armament on board, not within Her Majesty's dominions, but without? My Lords, I apprehend that the answer to that indictment would be, "That is not an arming of the ship; you have failed in the allegation which you have made." If that is so with regard to armament, it would be so with regard to equipment, and it would be so with regard to furnishing or fitting out. In truth, let us take common language as our guide upon the subject. I allege that a man furnished a house. Is

ARGUMENT.

2nd Day.

---

Argument.  
—  
2nd Day.  
—

that allegation proved, in point of fact, if I show that the house has not and never had a particle of furniture in it, but that a person went and ordered furniture to be made, and had it prepared, and had it set apart in some repository with the view to furnish the house at a future time and under different circumstances? And your Lordships will observe how far the argument which I am combating would have to go, because if the argument were a sound one it would be equally an offence within the Act of Parliament to show that there had been within Her Majesty's dominions an armament or an equipment prepared for a ship which was never within Her Majesty's dominions at all; it would be equally true to aver that A.B. armed, or equipped, or furnished, or fitted out a ship.

*Lord Chief Baron.*—Or attempted to do so.

*Sir Hugh Cairns.*—Or attempted to do so; that is to say, if you could show that the ship being without the dominions, and never having been within them, or intended to be brought within them, A.B. had prepared or attempted to prepare a certain armament or equipment with the view to be carried out of the Queen's dominions and put on board that ship.

But, my Lords, I would also observe that although it is extremely convenient and useful in endeavouring to arrive at the true construction of an Act of Parliament of this kind, to deal with a case such as I have suggested, and to consider how the law would be, your Lordships must also bear in mind that there is no suggestion and no evidence in this case (and this I undertake to show when I come to deal with the evidence as to the "Alexandra") that there was any armament or equipment, or any furniture or fitting out, other than what appeared upon the ship herself. Of course I except the matter with regard to the guns, which I told your Lordships yesterday was ultimately given up at the trial, although originally alleged by the Attorney General; but over and above that, there was no suggestion that there was any kind of armament or equipment away from the vessel, prepared for her, different from that found on board, if any was found on board.

My Lords, I also should observe, in speaking of the extreme cases which were put by way of testing the construction of the Act, that I was about when the Court rose to call your Lordships' attention to a phrase very often used, and I am not sure that it has not been used in the course of this trial. Some persons who take strong views as to cases of this kind say that it is a thing not to be tolerated, that the ports of this country should be turned into arsenals or used as arsenals for one of the belligerent powers. Now, if that is properly understood, I have not the least objection to the expression. If it means that you shall not use one of our ports for the purpose of putting on board a ship a warlike equipment, I agree to the term; but if it is intended to designate anything more than that, I entirely object to it; because there is not the slightest doubt that, according to the

popular meaning of those words, the law, whether right or wrong, is such that you may practically turn our ports into arsenals for one of the belligerent powers. There is nothing whatever that I am aware of in the law of this country to prevent one of the belligerent powers, for instance, employing or using a manufactory of arms in one of our ports with the view of shipping those arms afterwards. There is not anything that I know to prevent a belligerent power having a manufactory of arms in any seaport of this kingdom, such as the Government of this country have at Woolwich, and making guns and making small fire-arms, and making shot and shells on a large and extensive scale, and afterwards putting those guns and ammunition on board a freighted ship and sending them to a foreign port, subject, of course, to the liability of being captured as contraband goods; but so far as making an arsenal, or making a manufactory of arms in our ports, or near our ports, is concerned, the law of the country is so, that it may be done, and in practice something very like it is done every day.

ARGUMENT.

2nd Day.

My Lords, in the case of the American Act of Congress there were the decisions to which I took leave to call your Lordships' attention, which were available for our instruction and information as regards the law in the United States. Unfortunately, having gone through the observations which I had to make upon the construction of our English Act, I am not able to supply your Lordships with any judicial authority upon the subject of the construction of that Act in this country. The fact is, as has been stated, I believe, on both sides of this case, and I believe it is accurate so far as we know, that there never has been an instance in this country where any judicial construction has been put upon this Act of Parliament.

*Lord Chief Baron.*—My brother Martin intimated to us that he recollected perfectly well a case tried before Mr. Justice Coltman.

*Sir Hugh Cairns.*—That was the case of a Sicilian ship—Granatelli's case.

*Mr. Attorney General.*—We have a note of the summing up in that case. I cannot say much about its authenticity, for it does not come from a source which the Courts are in the habit of looking at; but if it be accurate, it seems to have been ruled by the learned Judge upon that occasion—

*Mr. Locke.*—I have it from the *Times* newspaper, my Lord.

*Mr. Baron Channell.*—Lord Chelmsford was the Attorney General of the day, I think; he was in the case.

*Mr. Locke.*—There is a full report of that case in the *Times* newspaper of the 6th of July 1849. I do not know whether your Lordships will pay attention to a report of that kind, but it seems very accurately done, and there is the summing up of Mr. Justice Coltman. I should also tell your Lordships that Mr. Justice Maule was on the bench at the Central Criminal

ARGUMENT. Court along with Mr. Justice Coltman upon that occasion, and there is one very important observation.

2nd Day.

*Lord Chief Baron.*—As far as my experience goes, the circumstance of a learned Judge being present has very little to do with his opinion about the matter. Unless in cases of very serious importance there are seldom two Judges present in the same Court. That is for the public convenience.

*Mr. Locke.*—The case occupied no less than four days in being tried; and on the one side was Sir Frederick Thesiger, and on the other Sir FitzRoy Kelly, besides other counsel.

*Mr. Baron Channell.*—The Corporation of the City of London employ a short-hand writer; whether they did so at that time or not I do not know.

*Mr. Locke.*—Yes, my Lord.

*Mr. Baron Channell.*—The report furnished by that short-hand writer is not a full report of the case; that is to say, of the speeches of counsel; but all points of law ruled are taken notice of; and it is printed by some bookseller in Chancery Lane, who publishes it. It comes out quarterly or monthly, and copies of that work are sent to the Judges. Whether that practice existed at the time when the case now referred to was tried or not, I do not know; if it did, we can have a copy.

*Mr. Locke.*—I can tell your Lordship exactly what the practice was at that time, and as it now is. A short-hand writer is employed by the Corporation, and copies are sent to all the members of the Corporation; I do not know whether to the Judges or not.

*Mr. Baron Channell.*—Yes, they are sent to the Judges.

*Mr. Locke.*—That short-hand writer merely takes down the evidence; there are no objections by counsel taken down, nor any arguments, nor any summing up of the Judges—it is simply the evidence. I have that book, if your Lordships like to consult it; but in consequence of there being no points taken, nor any summing up, I consulted the *Times* newspaper as the best medium that I could adopt, and I there found a very long report, during four days, and one or two objections which were taken; one by Sir FitzRoy Kelly, which bears directly upon this question, which was overruled by Mr. Justice Coltman; and likewise the summing up of the Judge; it is not given at very great length.

*Sir Hugh Cairns.*—Perhaps my learned friend will allow us to see the note, *valeat quantum*, which he has been able to obtain. I recollect, my Lord, proceedings which took place on the subject elsewhere.

*Lord Chief Baron.*—It is not usual in this Court, nor, I believe, in any Court, to refer to the report of a trial in a newspaper.

*Sir Hugh Cairns.*—No doubt, my Lord, that would be very inconvenient, and I do not propose it at present.

*Lord Chief Baron.*—The only use which I can make of it is

this, that my brother Martin who was present at the trial should be furnished with the newspaper report to refresh his recollection, and if he could report to us anything which was decided, it might be useful. I think that that is the only way in which one could apply it.

ARGUMENT.

2nd Day.

*Sir Hugh Cairns.*—My learned friends who are with me will look at what we have got; but I was about to say that I recollect very well proceedings which took place elsewhere with regard to the ship in question, and with regard to those who had chartered her, who were gentlemen of the name of Granatelli and Prince Scalia, who were taking part in the warlike proceedings against the Government of the King of Naples over Sicily at that time; and according to my recollection of the facts which took place, there is not the least doubt (whether there were arms on board or not, I do not know) that the ship was fitted out as a ship for warlike purposes in this country. I do not think that that was ever disputed. However we shall see if any information can be had upon that case; but the result of the trial was, that those who were accused were acquitted, and the matter then came to an end; the Crown did not take the course which they have done here of moving for a new trial.

My Lords, apart from that case, which I do not think will be found to bear at all upon the law which is here to be determined, I am not aware of any other case which has arisen, or in the course of which a judicial construction has been put in this country upon this Act of Parliament. My Lords, that is itself a very remarkable circumstance, and I will ask your Lordships to bear it in mind throughout this case. It is now 70 years since the American Act of Congress was passed; it is upwards of 40 years since the English Act of Parliament was passed; and that is, I take leave to say, a very remarkable circumstance. Occasions must have arisen, I should say, in the United States repeatedly, and in this country also more than once, where you would have found instances of ships convertible into ships of war, built in such a way as to be easily used for ships of war, taking their origin either in a port of the United States, while a neutral power, or in ports of this country while a neutral power, and leaving those ports without warlike equipments; instances must have occurred again and again in which those ships might have been made the subject of proceedings under the Foreign Enlistment Act, if it ever had occurred to the mind of any person that proceedings could be taken in a case where you had not the warlike equipment on board the ship.

My Lords, in the absence of decision upon the subject, it is not altogether improper to refer to what we have as matter of history in this country of cases in which proceedings were not taken—cases which were the subject of discussion and of consideration, and in which no proceedings of the kind took place. My Lords, I took leave (and the Lord Chief Baron perhaps may have a recollection of the circumstance) to mention, in the course of the trial, a case which excited a great deal of attention in this

**ARGUMENT.**  
**2nd Day.**

country, which was commonly called the Terceira affair. That occurred, I believe, about the year 1830. So far as it is necessary to mention it or refer to it now, the case was this:—It was at the time at which warlike proceedings were taking place between those who supported Don Miguel and those who supported the Queen of Portugal; and in the course of those warlike proceedings there came to Plymouth, in this country, a certain number of Portuguese refugees. They got a ship, and they left Plymouth in that ship, and sailed for Terceira; and there was exported from this country to Terceira in another ship a quantity of arms and warlike equipments, ammunition, and so on; and those articles so exported from this country were subsequently transferred into the ship which had gone with the refugees from Plymouth to Terceira. The Government of this country (rightly or wrongly we have not to decide) seemed very much annoyed at this, and they took a step which was greatly the subject of censure at the time, in the waters of Terceira, the waters of another power,—they gave directions to our ships of war there to intercept and to fire upon one of those ships which had so gone out. The matter became the subject of great controversy in England; and on the part of the Government this allegation was made. It was said on the part of the Government, “Suppose all that is stated to be the case,—suppose that our ships did fire upon those refugees in the waters of Terceira, still while they were in this country they committed a breach of the Foreign Enlistment Act, and made themselves liable to capture and to detention, because, although they did not put their armament on board the ship in which they left this country, they sent it out in another ship with the view and intention of afterwards transferring it into their own ship and incorporating the two.” Of course if that had been the case even, it would not have justified an attack upon them in the dominions of another power, because we could not seize within the dominions of another power a ship for a breach of our own Foreign Enlistment Act. But what I want to ask your Lordships’ attention to is the manner in which that doctrine was received, when it was put forward, by those who certainly were no mean authorities upon what was the power of the Government in this country with regard to an Act like the Foreign Enlistment Act. Mr. Huskisson was one of the Ministers who had taken a part in the passing of the Foreign Enlistment Act, and one of the supporters of the policy of it in general, for he was a colleague of Mr. Canning. Mr. Huskisson, in his place in Parliament, as we find from the report of his speech in Vol. III. of his Speeches, at page 559, said this: “It might be supposed from my right honourable friend’s remarks that during the 15 years we have been at peace our neutrality had never before been violated. Has my right honourable friend then forgotten the repeated complaints made by Turkey, and has he forgotten that to these complaints we constantly replied, We will preserve our neutrality within our dominions, but we will go no further? Turkey did not understand our explanation, and thought we

" might summarily dispose of Lord Cochrane and those other subjects of His Majesty who were assisting the Greeks. " To its remonstrances Mr. Canning replied (and my right honourable friend being then a colleague of Mr. Canning must be considered to be a party to his opinions), 'Arms may leave this country as matter of merchandise; and however strong the general inconvenience, the law does not interfere to stop them. It is only when the elements of armaments are combined that they come within the purview of the law, and if that combination does not take place until they have left this country, we have no right to interfere with them.' Those were the words of Mr. Canning, who extended the doctrine to steam vessels and yachts that might afterwards be converted into vessels of war, and they appear quite consistent with the acknowledged law of nations."

Now, my Lords, this is not the mere statement of opinion of Mr. Huskisson. If it were, of course it would be entitled to respect, and nothing more. This is the statement of a public act done by a minister of this country in the administration of the affairs of this country and in the dealings between this country and foreign powers. This is a statement made by a person who had been a minister at the time of which he spoke, of a complaint which had been made by Turkey at the time when Lord Cochrane was engaged in one of those expeditions in which, in his early life, he was engaged. Turkey complained that that was being done. Turkey complained of the export of arms, and ships leaving the country, though not armed; and the answer stated by Mr. Huskisson to have been made by Mr. Canning is this, "It is only when the elements of armaments are combined that they come within the purview of the law, and if that combination does not take place until they have left this country, we have no right to interfere with them." Now those clearly were cases where, if the doctrine now to be put forward had been considered to be the true exposition of this Act of Parliament, there would have been a right to interfere on the part of the Government, and we may presume that proceedings would have been taken to prosecute those ships.

My Lords, so much for that, which is one of the instances which we have of the opinion of those who had, if they thought fit, to put in force this Act of Parliament. I now come to two instances, much more modern and coming close to the present time, I mean those cases which have been mentioned already in the course of this trial, and mentioned on the occasion of the moving of the rule before your Lordships, namely, the cases of the "Oreto" and the "Alabama." I will take leave to say, in the first place, that I hope my learned friends who appear here on the part of the Crown will not suppose that I am going to do anything so foolish as to frame any argument *ad hominem*, with reference to anything which they may have said or done upon the subject, from the circumstance that they now appear here as counsel for the Crown. I wish to speak of the cases of the "Oreto" and the

**ARGUMENT.** "Alabama" as if those cases had occurred twenty years ago, and were simply matters of history; and if I refer to the words of individuals at all, I wish to refer to them merely as indicating the course of action which was taken with reference to those ships upon this Act of Parliament. I desire to frame no other argument than that. The cases themselves have now become matters of history. We find the whole record of the proceedings with regard to them already printed in the new edition of Mr. Wheaton's book on International Law. The case of the "Oreto" was simply this. She was a ship built in Liverpool. She left Liverpool unarmed, and without any warlike equipments. She was afterwards armed and equipped for warlike purposes, and she became in the result a ship in the employment of one of the belligerent powers, the Confederate Government.

*Lord Chief Baron.*—Where do those facts appear, so that the Court can take judicial cognizance of them?

*Sir Hugh Cairns.*—My Lord, they appear in the evidence, in this case, of one of the witnesses whose evidence I shall have to refer to. One of the witnesses states that he was on board one of the ships himself, and he speaks of his knowledge with regard to the other.

*Mr. Attorney General.*—If, my Lords, it be material (I do not know whether my learned friend will be pleased to hear it or not), I may mention, though any judgment which may have been formed in those cases by the advisers of the Crown is utterly immaterial to your Lordships as a matter of law, that the advisers of the Crown were of opinion that there was evidence to establish an intention.

*Sir Hugh Cairns.*—My learned friend is now arguing the case.

*Mr. Attorney General.*—You stated what you put as the facts.

*Sir Hugh Cairns.*—I am stating the matter upon my own authority; if it is not supported by the evidence, or by materials to which I can legitimately refer, my learned friend will have an opportunity of controverting it; but my learned friend is now arguing the case.

*Mr. Attorney General.*—My learned friend is stating what he calls a historical fact.

*Sir Hugh Cairns.*—I object to my learned friend's interruption.

*Mr. Attorney General.*—I object to the statement of what is not in the record for the purpose of this argument.

*Lord Chief Baron.*—I must say that I have some doubt whether much light can be thrown upon the subject which we are discussing by anything which belongs to the "Oreto" or the "Alabama."

*Sir Hugh Cairns.*—I will state to your Lordships exactly the view which I wish to present of those cases, and the use which I desire to make of them. Of course, if we had judicial decisions here to refer to upon the construction of the Act of Parliament, they would be that which we should look to first, and would



probably be those matters by which your Lordships would be guided. There are none; and it is, I apprehend, legitimate in the next place to look at the course which has been pursued by this country and by those who have the direction of the executive of this country, with reference to cases *in pari conditione* with what is said to be the case now before your Lordships. That seems to me to be a legitimate course to take, especially when you find that there has been an absence for such a length of time as 40 years of cases analogous to the present under this Act of Parliament. In that point of view I was about to refer to the cases of the "Oreto" and the "Alabama;" and if there be any dispute about the facts I desire to do no more than this—to take the statements made on behalf of those who were advising the Crown and acting for the Crown at the time when they were justifying their conduct, and the course which they pursued with regard to the "Oreto" and the "Alabama." If it were necessary to refer to it, there is evidence with regard to those ships, but I do not desire to go into it if there be any dispute about it. I will take the statements of those to whose words I am going to refer. Now it is in that point of view that I observe first upon the case of the "Oreto." This is the statement which I find made in Parliament by one of the advisers of the Crown with regard to the "Oreto," and it will be a statement, I think, bearing directly upon the view taken of the construction of the Act of Parliament. "The 'Oreto,'" says the Solicitor General, in Parliament, upon the 11th of March of this year, "was made the subject of due representation only once before she left this country, because she sailed from Liverpool on the 22nd of March, clandestinely, as did the 'Alabama;' and it was only on that same day that a conversation took place between Mr. Adams and Lord Russell, which might have led to her detention if she had not gone. On the 18th of February the first and only previous information communicated to our Government was given by Mr. Adams; he stated a case which clearly called for inquiry. Accordingly, the Commissioners of Customs were directed to make an inquiry; they did so, and on the 22nd of February they reported that circumstances worthy of credit tended to show that the 'Oreto' was going, or at all events was credibly represented to be going, to Italy, and not to America, and not a particle of evidence had been offered to the contrary; she was not then fitted for the reception of guns, and had nothing on board but coals and ballast. There was, consequently, nothing to justify her detention—nothing but vague rumours and suspicions. No further representation was made, and the 'Oreto' sailed on the 22nd of March. What then happened? The circumstances of her departure, and the contemporaneous representation made by Mr. Adams to our Government, made it probable that she was really intended for the Confederate States, and that our officers had been imposed upon. Still the case was not clear—there

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

" was nothing proved to have been done in England, which a Court of Law would certainly have construed as a violation of the Foreign Enlistment Act. Nevertheless, our Government immediately sent orders to Nassau, where she was understood to have gone, and when she arrived there she was watched. Upon the appearance of a delivery of stores, which appeared to be munitions of war, into the 'Oreto' while in our waters, though it was doubtful, and it was questionable whether the evidence would prove sufficient, still, to show our good faith, we strained a point, and acting upon this evidence, the 'Oreto' was seized. What was the result? She was tried and acquitted." Now my observation upon that is this: Here is a statement that the "Oreto" left Liverpool; that at the time when she left Liverpool she had no warlike equipment on board, but of course, from the nature of the case, she was prepared and able to sail away from Liverpool. She came to Nassau; she was still within our jurisdiction. Before she came to Nassau it had become clear that she was not going to Italy, where she had been said to be going originally; the circumstances were supposed to be sufficiently clear to justify a case made that she was going to be employed by the Confederate power. What is the course taken? Do they say "The mere fact that she was able to sail away from Liverpool, the mere fact that she had on board those appliances which would enable her to sail from the port of Liverpool, although she had no warlike equipment on board, will be enough when coupled with the intent to be employed in a particular way of which we now have evidence?" Nothing of the sort. The gravamen of the charge is that she took in munitions of war while in the waters of Nassau. I desire to put it no further than it ought properly to be put. I say that that is clearly a statement that the view taken by those who took proceedings against the "Oreto" was, that short of something which could be called a warlike preparation they could not institute proceedings against the ship; that there was nothing which amounted to a warlike preparation until she came into the waters of Nassau; and it was in respect of that preparation that she was seized.

Now the case of the "Alabama" was dealt with at the same time, and the facts respecting it I am willing to take in the same way and upon the same statement.

*Mr. Baron Bramwell.*—Was the "Oreto" tried at Nassau?

*Sir Hugh Cairns.*—Yes, my Lord, and she was acquitted.

*Mr. Baron Bramwell.*—Before what Court?

*Sir Hugh Cairns.*—Before one of our Courts there.

*Mr. Attorney General.*—The Admiralty Court.

*Sir Hugh Cairns.*—The Vice Admiralty Court.

*Mr. Baron Bramwell.*—Whatever it be worth one would think that there must be some direction by the presiding Judge there upon the matter.

*Sir Hugh Cairns.*—Very possibly, my Lord. She was tried, and acquitted for want of evidence.

*Mr. Baron Pigott.*—There seems to have been a difficulty there in finding evidence of intent. ARGUMENT.

2nd Day.

*Sir Hugh Cairns.*—Yes, my Lord; but the point which I am now submitting to the Court is this. Of course the evidence of the intent was supposed to exist when she was tried at Nassau. There were two things to which of course the evidence would be directed; the one would be the acts done with regard to the ship,—I mean as to her equipment; the other would be the intent with which those acts were done. I agree that it was supposed that there was no evidence of the intent till she got to Nassau; but then, assuming there was evidence of the intent, there were acts of equipment done at Liverpool which were sufficient, if anything short of a warlike equipment were sufficient; whereas it was supposed to be necessary to proceed against the ship, not for what was done upon her at Liverpool, but with regard to what was done at Nassau, namely, putting munitions of war on board.

Now with regard to the “Alabama,” I find in the same statement this:—“Were our Government wrong in not seizing the vessel? The circumstances disclosed in a case tried before “Justice Story” (that is the case of the “Independencia,” to which I referred yesterday) “were so far exactly the same as “those which occurred in the case of the ‘Alabama’”——

*Mr. Attorney General.*—Will you read a little earlier?

*Sir Hugh Cairns.*—I will read from the beginning of the paragraph:—“On the 1st of July the Commissioners made their report to Lord Russell” (that is, the Commissioners of Customs); “they said it was evident the ship was a ship of war. “It was believed, and not denied, that she was built for a “foreign Government, but the builders would give no information about her destination, and the Commissioners had no “other reliable source of information upon that point. Were our “Government wrong in not seizing the vessel then? The circumstances disclosed in a case tried before Justice Story were so far “exactly the same as those which occurred in the case of the “‘Alabama;’ and in the absence of any further evidence the “seizure of that ship would have been altogether unwarrantable “by law. She might have been legitimately built for a foreign “Government, and though a ship of war she might have formed “a legitimate article of merchandise even if meant for the Con- “federate States.” I will now refer to page 26, where the subject was again taken up. “What is alleged against us? “What is the extent of the acts committed even by individual “subjects of this country which can be considered contrary to “any law of our own? Why the building of these two particular ships” (the “Oreto” and the “Alabama”). “If our law “failed to reach them while they were within our jurisdiction, “and if nothing was done by them in our ports or in our waters “which was against international law, how can we be held responsible for their subsequent proceedings when on the high

ARGUMENT.

2nd Day.

" seas? It was not till the 'Alabama' reached the Azores that she received her stores, her captain, or her papers, and that she hoisted the Confederate flag. It is not true that she departed from the shores of this country as a ship armed for war." Now I do not understand language if that does not mean that the point of the case with regard to the "Alabama" was this, that although there might have been evidence (perhaps not conclusive, but still evidence sufficient to launch a case) as to the intent with which she left our shores, still there was that wanting which bore upon the other and equally essential part of the case. She did not leave our shores as an armed vessel, and more than that, she did not receive anything which could be called warlike equipment until she had reached the Azores.

But, my Lords, the matter as regards a subject of history with reference to the "Alabama" is made plainer still, because, after this statement of the course pursued with regard to the "Alabama" was made, and before the seizure of the "Alexandra" took place, and when certainly the public mind was anxious to know what was the line of duty which subjects of this country should pursue upon matters of this sort, I find that the following statement was also made with regard to the "Alabama." The Prime Minister, a fortnight after the statement which I have already read, said this. I refer to the 170th volume of the Parliamentary Debates, and to the Debate of the 27th of March 1863.—"I have myself great doubts whether, if we had seized the 'Alabama,' we should not have been liable to considerable damages. It is generally known that she sailed from this country unarmed, and not properly fitted out for war, and that she received her armament, equipment, and crew in a foreign port. Therefore, whatever suspicions we may have had (and they were well founded, as it afterwards turned out) as to the intended destination of the vessel, her condition at that time would not have justified a seizure." Now the distinction is as clearly drawn as words can draw it, between the intended destination as to which there might be some suspicion, which would be matter of evidence, and that which was a fact, *patens ad oculos*, namely, the condition of the ship; and here is a statement made by those who had considered the authority of an Act of Parliament of this kind, that a ship not fitted out with a warlike equipment when she leaves this country, whatever our suspicions may be with respect to her destination, cannot be made the subject of seizure, because her condition is not such as is pointed at by the Act of Parliament.

My Lords, I cannot help taking notice here of a statement made when the rule was being moved for by the Attorney General; it was my learned friend who referred to the case of the "Alabama" in this discussion. My learned friend said, according to the note which I have seen of the statement, that according to his judgment those who were engaged in the despatch of

the "Alabama" from this country had rendered themselves liable to the penalties of this Act of Parliament.

ARGUMENT.

2nd Day.

*Mr. Attorney General.*—I said so in the speech from which you have been reading.

*Sir Hugh Cairns.*—I am not aware that any statement of that kind was made, but I shall be very happy to read it.

*Mr. Attorney General.*—At page 19, "When the evidence was completed"——

*Sir Hugh Cairns.*—I will read it. "The first opinion was not communicated to Her Majesty's Government. When the evidence was completed, it was laid before the honourable and learned gentleman (he was not an officer of the Crown), who on the 23rd thought there was a case sufficient to warrant her detention. Upon that evidence the legal advisers of the Government came to the same conclusion as the honourable and learned member." That is upon that evidence. What that evidence was I know not, but I have a statement with regard to the condition of the ship when she left the country, as it was mentioned in the passages which I have read: there was not a case to warrant her detention. But I desire now, in addition to what I have said, and in addition to what my learned friend has said, to advert to what he wishes me to remember, namely, that it was his opinion that there were grounds under this Act of Parliament for proceeding with regard to the "Alabama." Now I ask this question. The "Alabama" left the country and could not be detained. I want to know why proceedings were not taken? The criminal proceedings remained. Those engaged in the affair of the "Alabama," so far as I know, never made any secret of it; they said, "We believed that we acted within the line of the law." I want to know why, within the twelvemonth during which proceedings might have been taken after the "Alabama" left the country, proceedings were not taken; and I should apprehend that if there were really those grounds which are now stated, they would have been taken to vindicate the law. But as matter of history no such proceedings were taken. These then were the cases of two ships which left the country without warlike equipment, and, as I understand (your Lordships will judge), the reason why no attempt was made to detain them was that there was an absence of that kind of equipment which would have justified their detention.

My Lords, I will ask your Lordships to apply (which I can do very shortly) the observations which I have made upon the construction of the Act to the evidence in this case with respect to the condition of the ship. I do not mean the evidence as to the intent with which she was to be despatched from the country, but the evidence as to the actual condition of the ship at the time of seizure. Now a distinction was made by the Attorney General in moving for the new trial, with regard to the condition of the ship, between what my learned friend called her structure and what he called things superadded to her structure. That there may be no

ARGUMENT.  
 2nd Day.

doubt about the view which was put forward, I will take leave to read one or two passages from what fell from my learned friend when moving for the rule. After giving to your Lordships a statement of the evidence with regard to the building of the ship, the sort of wood she was built of, the strength of her timber, and so on, my learned friend continued thus: "All that I have hitherto said connects itself with the structure of the vessel; but then there was further evidence going to what I apprehend is, in the strictest and most appropriate sense, fitting, furnishing, and equipment, as distinguished from construction, namely, evidence as to the machinery, the engines, the boiler, and other things of that description, constituting part of the furniture of the vessel, thereby to enable her to go to sea, which were either actually on board or actively in progress at the time."

Then again, considerably further on, at a later period, having referred again to the construction of the ship, her bulwarks and so on, my learned friend said, "But now we come to the fittings, furnishing, and equipments, distinct from the structure." Now as I understand it, to narrow the point as much as possible, a distinction is taken, in the observations of my learned friend, between what is called the hull, the structure, the scantling, the bulwarks, the strength with which the ship is built, the form which she receives from the builder's hands, and those other things which my learned friend mentioned, which virtually are these; the machinery, and certain things of which I shall say something more particularly, namely, the hammock nettings. Those are the matters to which my learned friend refers as distinguished from the structure, calling them equipment, fittings, and furnishing.

Now the evidence, my Lords, upon the point is this: I have to refer to four witnesses, but I think that what they say upon each point is very concise, and will not detain us long. Your Lordships will find Mr. Morgan's evidence at page 19. Of course, I do not propose to read it all. I will just read the passages which refer to what I have in view. About halfway down page 19, the evidence runs thus: "When you seized the 'Alexandra,' what was going on at the time on board the ship; was she complete?—When I seized her, about the time of the seizure, the workmen were variously engaged on board her. Do you recollect whether they were preparing anything for the hammock nettings?—Yes; they were fitting the stanchions for the hammock nettings. Were there iron stanchions on board the ship, in the hold?—They were fitted in their places. Do you recollect whether the masts were up?—All three of them. Were there any lightning conductors upon them?—There were lightning conductors upon each mast. Did you make yourself acquainted with the tonnage of the ship?—Yes." Then he goes on to state what the tonnage was. Now that is what Mr. Morgan says.

Then the next witness, my Lords, is Mr. Black. The part of

his evidence that I wish to refer to is near the bottom of page 61 :  
 " Was she strongly built ?—Yes. Of what wood ?—Her frame  
 " was of British oak, and her planking, so far as I could see,  
 " was of teak. Is it thick ?—Her frame is not extraordinarily  
 " strong, but the planking, both outside and inside, is stronger  
 " than is usual for vessels of that class to be classed at Lloyd's.  
 " How far apart were her beams ?—Well, they averaged about  
 " 2 feet apart ; some were more and some were less. Of what  
 " length ?—The extreme beam of the ship was  $21\frac{1}{2}$  feet. Did  
 " you observe her hatchways ?—Yes. What was the width of  
 " the hatchways ?—They were not wider than from 2 feet to  $2\frac{1}{2}$   
 " feet. Did you ever see a merchant vessel with a hatchway  
 " only 2 feet or  $2\frac{1}{2}$  feet wide ?—No. Could a vessel with a  
 " hatchway of that width be used as a merchant vessel ?—Not  
 " generally ; not for bale goods or anything of that kind. You  
 " could not get the goods into her ?—No. What could she do  
 " as a merchant vessel ?—She might put in small packages of  
 " hardware. They could not get the ordinary merchandise put  
 " into a merchant vessel, into such hatchways ?—No. What is  
 " the ordinary width of the hatchway of a merchant vessel ?—It  
 " would be of various sizes ; from 5 to 6 or 7 feet wide ; there is  
 " no particular size. But you never heard of a merchant vessel  
 " with a hatchway of 2 feet or  $2\frac{1}{2}$  feet in width only ?—No.  
 " What are its beams made of ?—British oak ; for the boiler  
 " space they are made of iron. Did you examine the bulwarks ?  
 " —Yes. Did anything strike you with regard to the bulwarks ;  
 " were they the bulwarks of a merchant vessel ?—No. For what  
 " reason were they not ?—From their extraordinary strength.  
 " Did you mark anything with respect to their height ?—Their  
 " height is about  $2\frac{1}{2}$  feet. Is that high or low ?—It might do  
 " with regard to height for a merchant vessel, but it is generally  
 " higher for a merchant vessel. But you say that the bulwarks  
 " were stronger than are used in a merchant vessel ?—Yes. And  
 " likewise lower ?—Yes. Now, what are the upper decks made  
 " of ?—Pitched pine. Have you ever seen pitched pine used for  
 " the decks of any vessel except vessels of war ?—No. You never  
 " have ?—No, except they are between decks. Do you consider  
 " this vessel altogether unadapted to mercantile purposes ?—It is  
 " not qualified for mercantile purposes. In your opinion, having  
 " examined her——" Then this question is objected to, and he  
 " is finally asked : " For what is she adapted ?—She is adapted for  
 " war purposes. What is her appearance ?—A very fine appear-  
 " ance ; she looks a handsome piece of architecture, very fine  
 " lines, capable of great speed, according to the power of ma-  
 " chinery." Then there are a few questions, on cross-examination,  
 " at the top of page 63, which I will read : " Do they use pitch  
 " pine for the decks of war vessels ; I understand you to say  
 " that pitch pine is not usually used for the decks of merchant  
 " vessels ; is it used for the decks of war vessels ?—I never saw  
 " it used for the decks of merchant vessels. Did you ever see it  
 " used for war vessels ?—Yes. Is it usual to use it for the

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

" decks of war vessels?—Sometimes, but not often. But not often; in fact it is not usual to use it for decks at all, is it?" " You say you first saw the 'Alexandra' on the 21st March?—" Yes." Then he is asked who told him to go on board, which I pass from; the date, however, will be material for another purpose; I ask your Lordships to observe it now; on the 21st of March Black first saw the "Alexandra," having been directed by certain American gentlemen to go on board.

My Lords, Mr. Green, at page 102, says what he saw. He says that he is a shipbuilder. I should say that that is hardly accurate. He said at first that he was a shipbuilder, but on cross-examination he said that he had not built a ship for 20 years; that he repaired ships; and he gave us a singular piece of information; he said that in his judgment no improvement whatever had taken place in the building of ships for the last 20 years, but that on the contrary, we were going back; that ships were not so well built now as they were 20 years ago, and that all the changes which had taken place in their construction were not improvements, but deteriorations. That is a matter of opinion, and of course he is entitled to his opinion. In the middle of page 102, as to the bulwarks, he says, "The bulwarks to which I first alluded as being different from any other vessel but a ship of war were composed of very thick planks, three inches thick, inside and out. *Lord Chief Baron.*—What was it?—It was teak. *The Queen's Advocate.*—What was the thickness?—The inside and the outside planks were three inches thick in the lower part, and two and a half inches thick in the upper part, and they were about two and a half feet deep. That would be from the deck to the top. Do I understand from you that that is an unusual thickness for a merchant vessel?—Yes. Had she any masts?—She had three masts. Had she a propeller?—Yes; her propeller was under water. What were her dimensions?" Then he gives the length and breadth, and the tonnage. "Did you observe her rudder?—The rudder was very strong, and a very thick formed rudder; unusually so. Was it thicker and stronger than would be used for a merchant vessel?—It was. You have spoken of the bulwarks; did you observe anything about the bulwarks,—any arrangements made for the upper part of the bulwarks to be fitted up with anything?—I discovered several iron stanchions for hammock racks, which were not put up; but there were arrangements being made for the staples to receive them. They were on board, but there were staples in the side of the vessel to receive them." I think that that is a mistake. I think it should be, "They were not on board."

*Mr. Attorney General.*—No, "they were on board."

*The Queen's Advocate.*—But they were not put up.

*Sir Hugh Cairns.*—That may be so. I do not know that it is very material; but I should have thought from the "but" that it should run "they were not on board."



*The Queen's Advocate.*—No, I think that they were on board, but were not put up. I examined the witness, and I think that that was so.

ARGUMENT.

2nd Day.

*Sir Hugh Cairns.*—I have no recollection of it, but I should have thought, from the collocation of the sentence, that the "not" was left out. "What in your judgment were the hammock racks for?—For hammocks. Is that usual on board a merchant ship?—Very seldom. Did you observe the arrangement of the deck; was there anything peculiar?—The scuttles or hatchways were not suited for a merchant vessel. Would you tell his Lordship, were they, or were they not, of the same kind as you would find on board a man-of-war?—Yes, quite so. They were of the same kind?—As a small class man-of-war. Did you observe the engines and the boilers?—No, they were only partially up. Did you observe whether there was any particular space before the boilers?—Yes. What was that?—I could not say what that would be appropriated for; there was an entrance to it by a narrow scuttle, not sufficiently large for a hatchway, it would suit a narrow staircase. Was this particular space before the boiler usual in merchant vessels?—Yes, in merchant vessels built for cargo. Was it fitted for carrying cargo?—No, because there was no hatchway, there was only a narrow scuttle. It was not fitted for carrying cargo, because there was no hatchway?—No, it was only what might be termed a narrow scuttle, which does not come under the denomination of a hatchway. Did you observe the forecabin?—I observed that it was not fitted as a merchant's forecabin, but as I have seen yachts and small vessels of war. Let me ask you, did you observe a cooking apparatus?—Yes, there was a cooking apparatus in the forecabin sufficient for 150 or 200 people. Was that the kind of cooking apparatus which is usual on board merchant vessels?—Only on board of passenger vessels; merchant vessels which are passenger vessels have as large and larger cooking apparatus; or ships which go on long voyages have as large. But a common merchantman would not have so large an apparatus?—No, not a small vessel like that. Did you observe the cabin?—Yes, I did, so much as was put up of it. Was there anything peculiar in it?—Yes; there appeared to me to be two compartments, which would either be fitted for pantries, but they were larger than pantries are, as I have seen pursers' or officers' cabins, and also the cabins of medical officers fitted. As you have seen pursers' and medical officers' cabins fitted?—Yes, somewhat similar in their fittings. What did you find on the starboard side of the cabin?—There were two sleeping berths, each with a bed place, and drawers under the bed place. You found two sleeping rooms on the starboard side?—Yes; they are sometimes called rooms and sometimes berths. With beds and drawers underneath the beds, you say?—Yes, drawers underneath the beds. Was there a third room?—There was a third room, but it was not appropriated; I cannot say what it was. But there was a third

ARGUMENT.  
—  
2nd Day.  
—

"room?—There was a small room fitted as a pantry, which I might represent as being at the foot of the entrance of the cabin. Was that the one you spoke of just now or another one?—No. You have spoken as to the starboard side; now tell me as to the port side?—I think there was one cabin with one bed-place on the port side. What sort of a room was that?—The bed-room was similar to the one on the starboard side. What kind of a room did it appear to be destined for?—There was a room before the bed-room, which did not appear to be appropriated; I could not say what that was intended for. Was there an after cabin?—Yes, a small after cabin. How large was that?—Nine or ten feet; I am not sure about the exact size. Did you observe the deck beams?—They were closer together than is usually required in merchant vessels."

Then I find that just at the bottom of the page, after passing over some argument which took place, the Queen's Advocate says, "I will state the question first to your Lordship. The witness need not answer it. But I was about to put this question; 'Was she, in your judgment, adapted for a merchant ship or for a vessel of war?'" The Lord Chief Baron says, "Or for a yacht?—*The Queen's Advocate*.—Yes, my Lord, or for a yacht. *Lord Chief Baron*.—The non-adaptation to a merchant vessel I have already." Then I think nothing further proceeded in the direct examination; but in the cross-examination, at page 106, your Lordships will see, about twelve lines down, "According to your experience in yachts, are the hammocks occasionally put up on these hammock racks?" He says, "Very rarely." "Do they ever do so?" He says, "I have known large sailing vessels fitted up somewhat similar. And fitted with conveniences for putting the hammocks on the bulwarks?—Yes. The sole object of that is for the purpose of greater cleanliness among the men?—Yes. And for having the hammocks put from below to air them?—Yes, and there is another object. Their original intention was to resist shot; that was their original intention. The object, when it is used in a yacht, is for the purpose of airing the hammocks of the men, is it not?—Yes." Then he says that the vessel was unfinished below.

Then, my Lords, there is Captain Inglefield, who, at page 58, about halfway down the page, is asked, "Of what timber is she built?—Principally of teak; her upper works are of other material; the kind of wood I cannot exactly say, but I should call her a strongly built vessel, certainly not intended for mercantile purposes, but she might be used, and is easily convertible into a man-of-war. And speaking of the strength of the vessel, is she in your judgment of such strength as would be adapted to her being used as a man-of-war?—She is. Did you find whether she had an accommodation for men and officers such as would have to serve on board a man-of-war?—She has. And as regards stowage room and the building of the

“ vessel, what say you to that?—As regards stowage room, she  
 “ has only stowage room sufficient for the crew, considering the  
 “ berthing of the crew to be for about 32 men. And as regards  
 “ her build generally, is it your opinion that she is adapted for a  
 “ man-of-war?—She is quite capable of being converted into a  
 “ man-of-war without having, at the time I saw her, any  
 “ appearance of fittings for guns. You say that there were no  
 “ guns or immediate preparations for guns?—There were none.  
 “ But having regard to the building of the vessel, might she or  
 “ not, in your opinion, be fitted for guns?” Then the Lord Chief  
 Baron says: “ He has said that already, that she is. He said  
 “ that she might be used as a yacht, and easily converted into a  
 “ vessel of war. *The Attorney General*.—I wish particularly to  
 “ call his attention to her fittings to receive guns. *The Lord*  
*Chief Baron*.—He has already said she is easily to be converted  
 “ into a man-of-war. *The Attorney General*.—Including her  
 “ adaptation to receive guns?—She is of sufficient length to  
 “ receive guns, but without any of those appurtenances which  
 “ would indicate that guns were about to be put on board.  
 “ Would you tell us to what you refer, Captain Inglefield, in  
 “ speaking of the appurtenances which indicate an absolute inten-  
 “ tion of putting guns on board?—Ring bolts at the side and  
 “ plates on the decks upon which pivot guns would turn. *Sir*  
*Hugh Cairns*.—There were none of those. *The Attorney*  
*General*.—No; he says there were none, and I ask him what  
 “ were the appurtenances. Would there be any difficulty,  
 “ in your judgment, in adding to the ship as she is now those pre-  
 “ parations for guns?—No difficulty. *The Lord Chief Baron*.—  
 “ Not only no difficulty, but it could be easily done?—Easily con-  
 “ verted into a man-of-war. *The Attorney General*.—When you  
 “ speak of a pivot on the deck, do you speak of three guns or of  
 “ several guns?—She might have two or three pivot guns. Would  
 “ she, according to the ordinary arrangement now-a-days of men-  
 “ of-war of her size, probably carry two or three guns or more on  
 “ pivot?—Probably three guns. Would those, according to the  
 “ ordinary course in these matters, be guns varying in size, or  
 “ guns of the same size?—Of varying size. Supposing there  
 “ were guns according to the ordinary course in such arrange-  
 “ ments, would the smaller guns or the greater predominate in  
 “ number?—I could only tell what guns would be fitted to the  
 “ vessel by knowing what size was intended to be put on board;  
 “ if they were smaller guns they must have ports; but if guns  
 “ of certain dimensions, they would be pivot guns, and would  
 “ fire over the bulwarks. Without ports?—Without ports. I  
 “ suppose if it were intended that they should fire over the  
 “ bulwarks, the bulwarks would be constructed comparatively  
 “ low, would they not?—Yes, they would. How did you  
 “ find the bulwarks in this ship?—Low, but not similar  
 “ to the bulwarks of gunboats in our service. Over which  
 “ they were to be fired?—Of certain dimensions. *The*  
*Lord Chief Baron*.—Those were low, but not low enough,

ARGUMENT.  
 2nd Day.

" according to our service, was, I think, your answer?—Not the same description as those in our service; they would be flying bulwarks. *The Attorney General*.—But would there be any difficulty, without proper gun carriages, in firing guns over those bulwarks?—It would be entirely dependent on the size of the gun. But with a proper adaptation of the size of the guns it might be done?—Certainly. About what height, so far as you recollect, of gun carriage would be required, to enable the gunners to fire over those bulwarks?—The gun carriage and slides in different kinds of guns vary very much in size; therefore, I must know the kind of gun, to be able to judge of the height or size of the carriage. It would depend on the kind of gun?—Yes. But with certain kinds of guns it might be done?—Perfectly."

Then he is cross-examined:—"On what calculation do you arrive at the conclusion, that this vessel would have accommodation for 32 in the crew? Is that upon the usual Navy allowance of room?—Yes. The length of her in the lower decks was 30 feet by 15, giving nine inches for each man; that would stow 32 men. You only give nine inches for each man in the Navy?—Nine inches only. That is rather close quarters, is it not?—Yes; rather. You say that the vessel was fitted for a yacht, and is easily convertible to a vessel of war; she could be used, I suppose, for mercantile purposes, not merely for a yacht, but she was capable of being used for mercantile purposes?—No; she was not capable of being used for mercantile purposes, because she had no stowage for merchandise. What state were her cabins in when you saw her?—They were not finished, but they were all laid out and bulkheaded off; besides the accommodation for men, there were cabins for five officers, a captain's cabin, and a mess-place. Were the cabins fitted up, or did you merely see the partitions between them?—They were partly fitted up; sufficiently to distinguish them as cabins. What was the difference between the cabins you saw and the sort of cabins that might be found in a yacht, supposing she was to be used for that purpose?—No difference."

Now that is the whole of the evidence, I believe, with regard to the condition of the vessel at the time of the seizure.

*Mr. Baron Channell*.—Captain Inglefield speaks as regards stowage room; he says that there is only stowage room sufficient for the crew, considering the crew to be about 32 men; that is to say, if the vessel were manned with 32 men there would be stowage-room enough for that number of crew.

*Mr. Baron Pigott*.—She had no stowage for merchandise.

*Mr. Baron Channell*.—He speaks in another part of the berths, or fittings, being sufficient for a great number; much larger than 32. He also says, that there is a small quantity of stowage room; and either this or another witness says, a very small hatchway; but then he says, that there is stowage room for a crew which would consist of about 32 men; that is as I understand it.

*Sir Hugh Cairns.*—If the crew were there they would take up that space; if they were not there it might be a question of occupying the space in some other way. When your Lordship speaks of the hatchway, the other witness to whom your Lordship has referred said that light hardware might be put in, but not the ordinary bulky goods of merchandise; and Captain Inglefield said very fairly with regard to the cabins, that of course looking at a yacht, where there would be a very large crew as compared with a merchant vessel, the cabins and accommodation of that kind for men were just the same as and in no way different from the accommodation which you would require on board a yacht.

Now, my Lords, the question seems to me, upon this point, to resolve itself into extremely simple elements. Of course we must apply the facts of the case to the construction of the Act of Parliament, upon which I have made the observations which I had to make to your Lordships, and I now refer to those observations for the purpose of applying the evidence. With regard to the structure, the strength of the bulwarks, and the sort of timber, be it teak or anything else, I apprehend that if I am right in saying that the building of any kind of vessel is not within the Act of Parliament, that is a matter which we need not go into with regard to the question whether her condition is an offence against the Act of Parliament. It may be proper, if you like to look at it upon the question of intent; that is a wholly different matter; it may be proper there to consider whether she had or not the appearance of a vessel which could be used for war; but upon the first part of the case, namely, the question whether there is the equipping, fitting out, furnishing, or arming, pointed at by the Act of Parliament, I apprehend that the structure of the hull is irrelevant, and that we may put it altogether aside. Then over and above that, what we have to consider with regard to the ship is this. There is here no suggestion that there was anything in preparation which was not on board, except it may be (which I am willing to allow) any part of the machinery which may have been required to complete the whole machinery of the ship. It probably is to be taken upon this evidence, that the machinery was not entirely on board; but a very great part of it was on board, and I will even argue the case as if the whole had been on board. There is the machinery, there are the hammock nettings, and, if you like to add them, the masts.

Now, in the first place, I should take leave to submit to your Lordships that it is not the case that any of those things are equipments of any sort. Those I apprehend are really part of the ship as a whole ship; part of the ship as distinguished from other things which might be added to the ship afterwards. The machinery in a ship which is to be propelled by steam is of course a part of the ship without which she can have no existence as a steam ship. So also with regard to the masts; so also with regard to things like the stanchions to receive the hammock nettings, which, according to the evidence of Mr. Green himself, are things which in their original invention no doubt were put upon

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

the sides of warlike vessels to resist shot, but which in their use at the present day, he says, are used on board merchant vessels, and are used on board yachts, for a purpose which is a very intelligible one, namely, for putting out the hammocks to dry, and to air, and to be ventilated properly at the side of the ship. I should say, therefore, if it were necessary, that those are things which really are part of the structure of the ship. But it is not necessary for me to argue that here. I say with confidence (and it is sufficient for my purpose), that it is in vain to contend that any of those things were warlike equipments of the distinctive character which is meant when that term is used. It is absurd to suppose that the machinery of a ship to be propelled by steam power is warlike fittings of that ship; it is absurd to suppose that the masts of the ship are warlike equipments of the distinctive character which I mention. It is equally absurd to suppose that stanchions for hammock nettings are warlike equipments, when we find that, whatever may have been the reason for their original introduction, they are now used on board merchant vessels and on board yachts. At this stage of the case there is no suggestion of any other kind of addition to the ship, or of work done upon the ship, which could come under the head of "equipment" or "fitting out." I say, as to those things which are spoken of in this compendious form, that there is not one of them which could be properly described as a warlike equipment of any kind.

But then it was said that a case could be made out which would bring the work either done or about to be done to the ship within the Act; that it could be shown that there were guns which were in course of preparation, and which were intended for the ship.

*Mr. Baron Pigott.*—Before you pass to that, it may become very material whether the word "not" ought to be in the evidence or not, because that applies to the hammock nettings; the words are, "they were on board."

*The Queen's Advocate.*—At what page is that, my Lord?

*Mr. Baron Pigott.*—Page 103.

*Sir Hugh Cairns.*—I do not know whether my Lord has a note upon that matter.

*Mr. Attorney General.*—There is no difference in the notes.

*The Queen's Advocate.*—And my recollection is very strong upon the subject.

*Sir Hugh Cairns.*—I do not at all suggest it from memory, but merely from the collocation of the words used.

*The Queen's Advocate.*—My recollection is that the witness said, that they were on board, and not put up.

*Sir Hugh Cairns.*—Perhaps I can save trouble on that point. The staples were there to receive the hammock stanchions. I should be very sorry to make a distinction between the staples and the stanchions to be put upon the staples. I should say, that the stanchions were there, which were to be received by the staples. Whether they were on board or not, there is clearly an indication of an intention to receive the hammock stanchions;

the vessel was made to receive hammock stanchions, and I am quite content to deal with it on that footing.

*Mr. Baron Channell.*—The staples show the intention, whether the stanchions were on board or not.

*Sir Hugh Cairns.*—Certainly, my Lord, and I do not think it at all proper to make a distinction between the two.

My Lords, I was going to refer to that which, of course, would have opened a very different case indeed if it had been susceptible of proof, and if it had been intended to be proved by any proper evidence, namely, that guns were being prepared which were intended to be put on board this vessel within Her Majesty's dominions, or that guns were being prepared, as to which the just conclusion was, that they were intended to be put on board within the kingdom.

Now, your Lordships will find the way in which the Attorney General at the trial opened his case with regard to the guns. At page 15, about 10 lines from the bottom, the Attorney General says, "You will also have evidence as to Captain Tessier, equally " and under like circumstances, inspecting the progress of the " 'Alexandra,' you will have the fact that the machinery for " the 'Alexandra' was constructed in the foundry of Messrs. " Fawcett, Preston, and Company, and that one large gun and " two small rifle swivel guns were also constructed in the " foundry for the purpose of being placed in and forming part of " the armament of the 'Alexandra.'" Now, my Lords, the Crown thought that they were going to prove that, which I suppose they conceived was not a very unimportant part of the case upon which the Crown detained this vessel, and claimed the forfeiture,—namely, that three guns were being constructed by Messrs. Fawcett, Preston, and Company, for the purpose of being placed in and forming part of the armament of the "Alexandra."

Now, the evidence upon the point was the evidence of three witnesses; and I will take leave to refer your Lordships to them shortly. The first of them was Robinson, at page 40. He is asked, "You are a joiner living in Liverpool?—Yes. You were " formerly in the employ of Messrs. Fawcett, Preston, and Co. ? " —I was. How long since is it that you have left?—I left " about two months ago. Was it your business there to make " gun-carriages?—Yes, that was my employment. *Lord Chief* " *Baron.*—What are the names of your employers?— " Messrs. Fawcett, Preston, and Co. *Mr. Jones.*—Was it your " business to make gun-carriages?—Sometimes. Do you re- " member making gun-carriages, or helping to make gun- " carriages, for three guns in particular?—Yes. What were the " guns that you were making gun-carriages for?—Pivot guns. " How many, I mean?—Three. Was there one large gun?— " I believe there was. And two other smaller guns?—Yes. " There was also helping to make these gun-carriages, I believe, " a man named Joseph Carter, was not there?—Yes, I knew a " workman by that name. How long were you employed in " making these gun-carriages?—I was variously employed, not " constantly." Then this is his cross-examination. He is asked,

ARGUMENT.

2nd Day.

ARGUMENT. "Messrs. Fawcett, Preston, and Company are very extensive  
 — "engineers, are they not?—Yes. They make a great many  
 2nd Day. — "steam engines, do they not?—Yes. For steam vessels?—Yes.  
 — "They make a great many guns, do they not?—Sometimes.  
 "A good many in a year?—Yes. And have done so for many  
 "years, do you not know?—Yes." Then he says, that he has  
 been with them 22 months. "And I suppose you saw a good  
 "many guns made in that time?—Yes. And gun-carriages?—  
 "Yes." Then he states why it was he left them.

Up to that point, therefore, we have this fact, that these articles were made in an establishment which was proved *aliunde* to be one of the most extensive in the kingdom, making hundreds of guns in the year, and steam engines, and everything which can be done at an extensive manufactory.

*The Queen's Advocate.*—Was there any evidence of that?

*Sir Hugh Cairns.*—Yes, which I will read at the proper time. I do not wish to mix it up with this evidence. In a manufactory of this kind, this witness says that three guns were made, and three gun-carriages made for those guns; that is all he says, and that a Mr. Hamilton looked at them.

Now Carter, at page 41, says, that he is a joiner also at Liverpool; that he had been in the service of Messrs. Fawcett, Preston, and Co., and had left their service; and about six questions down he is asked this:—"For some time before you left, in April last, were your masters, Messrs. Fawcett, Preston, and Company, making machinery for a propeller boat?—Yes. Was the boat for which the machinery was being prepared, known in your workshop by a number?—Yes. What was the number?—2,209." Then he was asked whether he had been on board the "Alexandra," which does not relate to the guns, and I pass over page 42 and come to about 15 lines down in page 43. "Did you hear this vessel spoken of by any one of those gentlemen, or in the presence of any one of those gentlemen," (that is, the partners in the firm of Messrs. Fawcett, Preston, and Company,) "by any description, except No. 2,209?—No. While the machinery was being prepared, were you frequently at work in your business of a carpenter in the erecting shop?—Sometimes. Is that the shop where the machinery is prepared and fitted for the vessel?—Yes. While you were there did you ever see a gentleman of the name of Hamilton?—Yes, I have seen him there. Did you see him there frequently or seldom?—I have seen him there pretty often. When he was there, did you see whether he paid attention or did not pay attention to the machinery?—I could not say that he did particularly to any branch of it; I could not see that he did to that branch of the machinery more than to another. Besides that machinery which was being prepared for the No. 2,209, was other machinery for vessels being prepared in the same room at the same time?—Yes. Do you remember while the machinery was in progress for the 'Alexandra,' whether any gun or guns were prepared?—Yes, they were preparing some at the same time as she was in the building. I think you said some carriages just now?—



" Some carriages and guns were prepared at the same time.  
 " At the same time that the machinery was being prepared,  
 " as I understand you?—Yes. Was it any part of your business,  
 " and were you employed with regard to the gun carriages  
 " and the slides for those guns?—I was working at them.  
 " You were working at the gun carriages and slides?—Yes.  
 " You say that 2,209 was the number by which the vessel was  
 " called?—Yes. Was there any number connected with the  
 " guns?—Yes, each gun had a separate number. *Lord Chief*  
*Baron.*—Not 2,209?—No. *Mr. Attorney General.*—How  
 " many guns were there that you are speaking of?—Three. One  
 " large gun, was it?—Yes. And two small guns?—Yes. Were  
 " the small guns rifled or not?—Rifled. You say each had its  
 " number?—Yes. Was there a number on the gun carriages  
 " and slides for the large guns?—There would be the same  
 " number as the guns," that is to say, the slides would be the  
 " same number as the guns; "they would all go by the same  
 " number; each would go by its own number. Do you re-  
 " member whether there was a number upon the gun carriages  
 " and slides fitted for the large guns?—The same number upon  
 " the carriages as upon the guns. What was that number?—  
 " That I will not say; I will not be positive of the number.  
 " *Lord Chief Baron.*—The number on the gun carriage was the  
 " same as on the gun?—Yes, exactly. *Mr. Attorney General.*—  
 " Do you remember any of the numbers or not?—As far as  
 " opinion went; I would not swear to the number. To the best  
 " of your recollection?—I think 2,205 and 2,204 were the  
 " numbers of the small guns; of the large one I would not say.  
 " Have you any recollection at all about the number of the large  
 " gun?—No. One way or the other?—No. As to the manu-  
 " facture of the guns and gun carriages, I think you said it was  
 " going on at the same time as that of the machinery?—Yes."  
 Then a question arises as to a question put. Then he is asked,  
 " Were they, as far as you could see, manufactured for use  
 " in the same vessel as the machinery or not?—That I could  
 " not say; they might be, or they might not be." Then  
 lower down the question is put, "Can you tell us about  
 " how high the larger gun, whatever its number may have been,  
 " would stand on the gun carriage?—It would stand about four  
 " feet. And the smaller ones?—About three, I think. You told  
 " us that you knew Mr. Sillem, one of the partners?—Yes. Was  
 " he frequently in the shop of his own firm at the time when  
 " this machinery and the guns were going forward?—Yes. Did  
 " you notice whether he did or did not pay any particular atten-  
 " tion to the guns?—They were generally there: he was the  
 " principal partner in that line. That is his line?—Yes. Have  
 " you seen from time to time Mr. Hamilton with Mr. Sillem in  
 " the shop?—Yes. I mean at this time when the machinery and  
 " the guns were in preparation?—Yes. Have you at any time  
 " or times heard Mr. Sillem speak of alterations, either in the  
 " screws of the gun carriages, or other matters connected with  
 " the guns, in Mr. Hamilton's presence?—I have heard him make

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

" the remark that he could make improvements in the compressor screws. You have heard Mr. Sillem say that to Mr. Hamilton ?  
 " —Yes. That he could make improvements in the compressor screws?—That he had done so. What did Mr. Hamilton say upon that?—He thought it was a great improvement upon the old original one. He said that?—Yes. *Lord Chief Baron.*—  
 " In the lock?—No, the compressor screws. *Mr. Attorney General.* You told us the small guns were rifled?—Yes. Do you remember about what time it was that the casting of the guns for the carriages was going on?—It was all going on together. At the same time that the rifling of the small guns was going forward?—Yes. As to the rammer and sponges for the guns, were those made in the same shop?—No. In the pattern shop?—Yes. That is another place, is it?—Yes. Were those gun carriages of a common or of an unusual kind ?  
 " —They were good ones. Were they of an ordinary description, or were they rather difficult to construct?—Rather difficult, I should say. Not of a very ordinary or common description?—No. Do you remember what they were made of?—English elm. And of what were the slides made?—Teak wood. Did you happen to know where the teak wood for the slides was obtained?—Yes. Where?—At Mr. Miller's. At Mr. Miller's yard?—Yes. Did you see the gun carriages finished?—No, they were not quite finished when I left. Had they or had they not been nearly finished for some time before you left?—Yes."

Then on cross-examination at page 47 your Lordships will see this:—"Can you tell me when you left?—Three or four months since. These gentlemen carry on business as engineers and founders on a very large scale, do they not?" that is Messrs. Fawcett,— "Yes." This is the evidence which I told your Lordships would put you in possession of the character of their works. "I believe they have 800 or 900 workmen employed at a time on their premises?—I dare say, if you take both yards into consideration, there would be more than that. I believe they make all sorts of machinery?—Yes. Rice mills, cotton presses, and other things?—Yes, all sorts. And the hands generally are pretty full of work?—Always very busy since I have been there. I suppose your work as a joiner was carried on under one particular roof, was it not?—Yes. And the machinery was put in another place?—Yes. And was there one place where guns were bored?—They were bored in one place. And they are constantly boring guns, are they not; it is a part of their business to bore guns?—Yes. And if you go into the yard you generally find a quantity of guns, which are there ready for sale?—Oh, any sort you like. How long had you been in their employment before you left on this occasion?—About a year and eight months. Now you said that the teak on which you worked came from Messrs. Miller's yard?—Yes. They are dealers in timber, are they not?—Yes. Teak is the best wood for making slides, is it not?—I do not know. It is as good as any?—I suppose it is as good as any. Is it commonly

" employed for making slides of guns?—I cannot say; I never made any slides before I went there."

So much, my Lords, for Carter, as to whom it does not require argument to say, that he proved nothing whatever except the fact that three guns were being made in a place where a great number of others were being made, and where guns of all sorts were getting ready for sale.

Hodgson, my Lords, at page 48, who is a warehouseman, is asked, " Were you for any length of time in the service of Fawcett, Preston, and Company?—About a year and eight months. " In what department of their works were you?—When I first was there I was put in the yard as a labourer, and after I had been there a short time I was put in the packing room. Were you in the packing room in the earlier part of this year?—Yes. " And some time before?—Yes. When did you leave the service of Fawcett, Preston, and Company?—About the same week as Carter left. Some time before you left were Fawcett and Company making any machinery for any particular ships?—Yes. What ships?—The 'Alexandra' and the 'Phantom.' Were they making guns? *Sir Hugh Cairns*.—Were you engaged about the machinery?—No; but it all had to come to the packing room before it went out of the yard, or was sent there. *The Solicitor General*.—Besides machinery, were they making guns?—Yes. And gun carriages?—Yes. And shot?—Shot. And shell?—Yes." Then an objection is made to a question, and we pass on, with your Lordships' permission, to page 50, about four lines down. " Who was in the habit of sending you over for that purpose?" that is, to see how far advanced goods were which had to be packed. " Mr. Bradshaw, who is in the packing room along with me. He was employed with you?—Yes, he was employed in the packing room. You said you or Mr. Bradshaw went or were sent over?—Yes. Who sent you over?—Mr. Bradshaw would send me or go himself. When you were sent were you directed as to what you were to inquire for?—For such a number, 2,209. You were to inquire for 2,209?—Yes. For what things were you to inquire, identified by that number?—Everything belonging to the machinery." Then about 12 lines lower down, the Solicitor General says, " Were you sent for machinery for that number?—Yes. And for clenches and bolts?—Yes. You had to pack them?—I took them up myself. Did you take them to the ship?—Yes. And you know that they were for that ship by that number?—Yes. Did you ever hear that ship spoken of by any one of the partners in the office?—No, not by anyone in the office." Then, my Lord, a question arises as to the form of examination, and we pass on to page 51, about six lines down. The Solicitor General says, " My question is this, my Lord. Did Mr. Speers, who is stated to be the manager or foreman of Fawcett, Preston, and Company's works, give the witness any orders with respect to those things? *Sir Hugh Cairns*.—What things? *The Solicitor General*.—Machinery, clenches, and bolts. *Sir Hugh Cairns*.—I have no objection to the question then, if that is all. *The*

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

" *Solicitor General*.—Did he give you any orders?—Yes. What were the orders?—To see if the things were ready, and to take them if they were ready, as the men were waiting for them in the yard. To take them where?—To take them up to Mr. Miller's yard, or to the boat. Or to where?—To the gun-boat. Those were the words of Mr. Speers?—As far as I remember. *Sir Hugh Cairns*.—As far as you recollect?—Yes. *The Solicitor General*.—Where did you take them, in consequence of that order?—I took them to the yard, and left them in the stores of Miller's yard. What became of them afterwards?—The men would be waiting to use them, when I got there. What ship was it?—The ship now called the 'Alexandra.' Was the 'Alexandra' in the stocks, it ought to be, at that time?—Yes. You saw the things in consequence of that order taken to the 'Alexandra'?—Yes; the men have been waiting for them, and when I have taken them they have said, 'Are those for the gunboats?' and I have said 'Yes.'"

My Lords, nothing occurs in that as to guns. At the bottom of page 51, if your Lordships will be good enough to turn to it, a question is asked about Mr. Hamilton; he was in the works. "Do you know a person of the name of Hamilton?—Yes. Did you ever see him there?—Yes. Whom was he with?—Sometimes alone, and sometimes with Mr. Sillem, and sometimes with Mr. Mann, but he was more often with Mr. Mann." And then at the top of page 52 he is asked, "What did he come about;" that is objected to. "Do you recollect anything he said in their presence in the packing room?" that is, in the presence of members of the firm of Fawcett, Preston, and Company.—"No. Do you remember anything he ever did in their presence?—No, except examining the shot and shell. Did he talk to them about it?—Mr. Sillem and Mr. Hamilton were talking about it; I could not understand what they said. You did not hear what they said; they were talking, and they examined the shot and shell?—Yes. Did their conversation stop when you came near them?—No, I did not notice them stop their conversation." The Crown, of course, had been under the impression that the witness was going to say that the conversation did stop. "Have you ever seen Mr. Hamilton at Miller's yard?—I met him coming along the yard." There is nothing about guns till we come down to the bottom of page 52. "Do you recollect packing any of the guns that were made at that time?—No, not the large ones; I packed the small ones. How many guns were there for that job?—Intended for the boat, three." That is objected to, and the *Solicitor General* says, "You say you packed the two smaller guns; was that at the same time the machinery was being made for this boat?—Yes. Do you know what was done with them?—They were sent down to the North-western Railway Station. Which station?—At Wapping. In Liverpool?—Yes. Were the carriages packed as well as the guns?—Yes. Were there a good many carriages?—Yes. How many?—16 or 17."

ARGUMENT.

2nd Day.

16 or 17 gun carriages, that is to say, of course, for the same number of guns. "Did you ever hear any one of the partners of the firm, or Mr. Speers, say for what ship those guns were intended?—No. *Lord Chief Baron*.—I do not think that Speers would do, except in the giving of some actual direction. *The Solicitor General*.—My intention was to refer to what he said in giving orders as manager. However the witness says, "No." Is it within your knowledge how those packages were addressed? They were marked O.A. and C.B. with a diamond, and numbered. To whom were they addressed?—To Captain Blakeley, Camden, London." Therefore that was the result,—these gun carriages were 16 or 17 in number, including some particular three as to which it was the fancy of the Crown to ask this witness, and the last that was heard of them was that they were traced to the London and North-western Railway Station in Liverpool, directed to "Captain Blakeley, Camden, London." Of course it does not require me to argue that there is not in the whole of that which I have read, which I believe is every syllable with regard to the guns, anything like a scintilla of evidence that those guns were intended for the "Alexandra." They were being made in a manufactory, I agree, at the same time as the machinery of the "Alexandra" was being made, but there is nothing whatever in the evidence which in any way connects them with the "Alexandra," or shows any intention so to use them.

When that evidence was given, my Lords, the Attorney General's view of it in reply your Lordships will find very fair; there can be no objection to it at all; it is at page 215.

*Mr. Baron Bramwell*.—What is your proposition now; is it that there was no evidence to go to the jury of a warlike equipment?

*Sir Hugh Cairns*.—No, my Lord; I am not applying for a new trial. The Crown moves for a new trial. I say that there was no evidence in point of fact which can be laid hold of on a rule for a new trial upon the ground of the verdict being against evidence, or against the weight of evidence. There was no evidence at all to connect these guns with the ship.

*Mr. Baron Bramwell*.—Are we to understand that the claimants could be called as witnesses?

*Sir Hugh Cairns*.—I do not know that they could not.

*Mr. Baron Bramwell*.—I think they could.

*Sir Hugh Cairns*.—I have no reason to suppose that they could not.

*Mr. Attorney General*.—No doubt they could.

*Mr. Baron Bramwell*.—I am very glad to hear the Attorney General say so.

*Mr. Attorney General*.—We have always supposed so.

*Mr. Baron Bramwell*.—My impression is so, undoubtedly. There was an Act of Parliament in the most comprehensive terms, enabling parties to be called as witnesses. There was a doubt whether it excepted criminal cases; there was a doubt whether

ARGUMENT.

2nd Day.

it applied to informations in the Exchequer for penalties. There was an express statute; saying that it should not so apply. It does not seem to me that that express statute affects this case. I think that the parties are admissible.

*Mr. Attorney General.*—When I said “no doubt,” I only meant to say that we had never entertained a doubt in our own minds. I did not at all mean to say that there might not be ground for one.

*Mr. Baron Bramwell.*—I meant that I am glad that it is matter which we shall not have to discuss in this case. Of course when one is considering whether a verdict is against the weight of evidence, I cannot help thinking that when the claimants might have been called to set the matter right upon their oaths, a very small quantity of evidence would be sufficient to justify the jury in finding against them. However, you are addressing yourself to the weight of evidence.

*Sir Hugh Cairns.*—The case of the Crown here is, that they are moving for a new trial upon the ground that the jury have found against the evidence, and against the weight of evidence, and therefore it becomes material for me to show your Lordships what in point of fact that evidence was.

*Mr. Baron Bramwell.*—No doubt; I only wanted to see whether at the present moment you were addressing yourself to this point, namely, that there was no evidence at all, or to the other question that there was some.

*Sir Hugh Cairns.*—I have no object in contending that there was no evidence to go to the jury. I have the verdict. I am meeting a rule obtained upon the ground that the verdict was against evidence.

*Mr. Baron Pigott.*—I suppose that the Attorney General observed to the jury upon the claimants not being called?

*Sir Hugh Cairns.*—Certainly, my Lord; it was a great part of the address, as I shall show your Lordships by and by upon the other part of the case.

*Lord Chief Baron.*—Do you remember what was the Act which was passed to settle the doubt about the parties being called as witnesses?

*Mr. Kemplay.*—The 17th and 18th Victoria, chapter 122; your Lordship will find it all in the 10th Volume of the Exchequer Reports, in the case of *The Attorney General v. Radloff*.

*Mr. Baron Bramwell.*—The 15th clause enacts that “The second section of the Act of the 14th and 15th years of Her present Majesty, chapter 99, shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalties or forfeitures, under any law now in force or hereafter to be made relating to the customs or inland revenue.”

*Lord Chief Baron.*—With respect to the admissibility of witnesses, in the case of *The Attorney General v. Radloff*, which was in this Court, there was a difference of opinion. I thought that the witnesses were not admissible, and Lord

Wensleydale, who was then one of the Barons of the Exchequer, was of the same opinion. I rather think that my brother Martin and the late Baron Platt were of a different opinion. I find in the marginal note the following words:—

“This decision has become superfluous, the Legislature having adopted, and enacted the construction of the Chief Baron and Baron Parke. See the 17th and 18th of Victoria, chap. 122, section 15.” Then at the end of that is put the section—

“The second section of the Act of the 14th and 15th of Victoria shall not be deemed to apply to any suit or proceeding in respect of any offence, or for the recovery of any penalties, under any law relating to the customs or inland revenue.”

This proceeding is under the Foreign Enlistment Act; this proceeding is instituted as if it were a case of inland revenue. You find at the end of the 7th section, which creates the forfeiture, a provision that every such ship shall be forfeited, and that it shall be lawful for the officers of customs and excise to make the seizure, and in the manner in which they are empowered to seize for breaches of revenue. “And that every such ship and vessel, with the tackle,” and so on — “may be prosecuted and condemned in the like manner, and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise.” Now, whether the impediment as to calling witnesses, which is continued in respect of the customs and excise, applies also to a forfeiture like this, is not absolutely free from doubt; and I do not think it at all necessary to solve that doubt here. The learned Attorney General at the trial assumed that the parties might be called, and I did not think it necessary to say anything about that, one way or the other.

*Sir Hugh Cairns.*—No, my Lord; the question certainly was not argued, and I do not desire to address any argument to your Lordships upon it now.

*Lord Chief Baron.*—The argument of the question arose entirely upon the law, and the Attorney General had had no opportunity of being heard upon it.

*Sir Hugh Cairns.*—None at all, my Lord.

*Lord Chief Baron.*—But I certainly should have some difficulty in saying that the proposition, either one way or the other, is wholly free from doubt; I will not say that there is much to be said on both sides—though there very often is; but I think that there is something to be said on both sides. On the one side it may be said, that this proceeding for a forfeiture and in the manner of a forfeiture under the customs and excise laws would carry along with it that if the defendants may not be witnesses in the one case they shall not be witnesses in the other. On the other hand it may be said, that strictly speaking the 36th section of the Act of 18th and 19th Victoria, chapter 96, says that “the second section of the Act of the 14th and 15th years of Her present Majesty, chapter 99,

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

"shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalty or forfeiture, under any law now in force, or hereafter to be made, relating to the customs or inland revenue." This is a proceeding for a forfeiture, and although the forfeiture is not under the law of the customs or excise, the proceeding is under the law of the customs and excise.

*Mr. Attorney General.*—I do not know, my Lord, that it is at all important, but perhaps your Lordship would like to be informed that the Act from which your Lordship has been reading is repealed by a subsequent Act, namely, the 20th and 21st of Victoria, chapter 62; and the 14th section of that Act, which stands in its place, is in rather different words,—“The several Acts which declare and make competent and compellable a defendant to give evidence in any suit or proceeding to which he may be a party shall not be deemed to extend or apply to defendants in any suit or proceeding instituted under any Act relating to the customs.” That is the language.

*Lord Chief Baron.*—Then you observe that the offence is certainly not under the excise laws, but the mode of proceeding is under those laws. I do not know whether I make myself intelligible. The offence is quite apart from the excise laws, but the mode of proceeding is according to the excise laws.

*The Queen's Advocate.*—The party is not a defendant, my Lord.

*Sir Hugh Cairns.*—I think, my Lord, if it should become necessary, the matter will receive more consideration. At present it does not occur to me to submit any argument upon it to your Lordships.

*Lord Chief Baron.*—Mr. Attorney General, has this Act of the 20th and 21st Victoria, repealed the other?

*Mr. Attorney General.*—I believe that it has, my Lord, but I will not undertake to say that I have examined it so as to satisfy myself upon that subject. I am told so by a gentleman attending from the customs.

[After a short interval.]

*Mr. Attorney General.*—I hope that your Lordship will take it that it is not so clear that it repeals it at all. I was certainly informed so by a gentleman whom I have every reason to trust. I see there is a repealing section here, but it is of a former repealing Act.\*

\* A question arose in the Court of Exchequer in Hilary Term, 1854, on the admissibility of the defendant as a witness on his own behalf under 14 & 15 Vict. c. 99, secs. 2 & 3. It was the case of *Attorney General v. Otto Radloff*, a customs prosecution, tried before the Lord Chief Baron Pollock, in which the defendant, being tendered as a witness, was, on objection taken, rejected. A rule for a new trial was granted on this point, and in Easter Term the case was signed, when, the Court being equally divided, no judgment, and the rule dropped. 10 Exchequer Reports, p. 84. The question remaining in doubt, it was suggested by the Court that the point should be settled by legislative enactment, and in accordance with that suggestion the 36th section of the 18 & 19 Vict. c. 99, was introduced. The Act of 14 & 15 Vict. c. 99, did not extend to Scotland; and a similar question having arisen there under the 15 & 16 Vict. c. 27, sec. 1, a corresponding amendment of the customs law was made by 20 & 21 Vict. c. 62, sec. 14, applicable to the several Acts in force relating to the law of evidence, by which the defendant was in more express terms excluded from giving evidence in any customs suit or proceeding in which he might be a party. Both the amending sections remain unrepealed.



*Sir Hugh Cairns.*—That may be an argument for some other time. At present I desire to ask your Lordships' attention to a very simple matter, namely, this matter about the guns; that is all I am dealing with at present.

ARGUMENT.

2nd Day.

*Lord Chief Baron.*—I should have been very sorry if it had been necessary for me to lay down any rule upon the point. It may have been a matter for argument, but you took no objection, and there I left it. It appears to me that the statute is not repealed which you first referred to, and that the 20th and 21st of Victoria applies only to Customs and not to Excise at all. You, Mr. Attorney General, and I, have something to learn and consider before the next revenue case comes before us. It is a matter about which it is certainly possible to say a great deal on both sides. I do not offer an opinion one way or the other. I should be sorry now to express an opinion without hearing the matter argued.

*Sir Hugh Cairns.*—It will be time enough when the time comes to argue that question. It would appear to me certainly to be a very singular thing if in a case in which a misdemeanor is created—

*Lord Chief Baron.*—I think it really arises in this way,—the forfeiture here is not under the Excise laws, but the proceeding to enforce the forfeiture is to be according to the proceedings of the Excise laws in cases of forfeiture.

*Sir Hugh Cairns.*—This proceeding is as it were carried into the Excise Acts, whatever they may say upon the subject. I was only going to say, though I am far from wishing to argue the question now, that it would be a very surprising thing if it should turn out that in a case where a misdemeanor is created, and where the proceeding for forfeiture, being a proceeding *in rem*, would be conclusive against all the world as to the facts which are necessary to found the proceeding *in rem*, that although in a case of mere misdemeanor no one would contend that the defendant would be examinable, yet that he would be examinable or compellable to be examined in a case of a proceeding *in rem*.

*Mr. Baron Bramwell.*—This is to be observed, that he is a volunteer to a certain extent here, whereas if indicted for a misdemeanor, he would not be; he need not come and make the claim.

*Sir Hugh Cairns.*—Very true.

*Lord Chief Baron.*—There may be a seizure of property to the amount of 10,000*l.* or 20,000*l.*

*Mr. Baron Bramwell.*—Undoubtedly, if he is indicted he cannot escape the consequence. I own I think that this is a matter of very considerable importance.

*Sir Hugh Cairns.*—Your Lordship's observation must be taken in connexion with this, though it is quite true he is a volunteer, yet if the argument be correct that he is examinable, then the Crown could examine him whether he volunteered or not, and compel him to attend though his name was in the information.

ARGUMENT.

2nd Day.

*Mr. Baron Bramwell.*—That would follow. I own I think this is a matter of considerable consequence, because if there is any reasonable evidence to go to the jury, and the defendants by being called could clear it up and say, "This vessel was not for the Confederate States at all, or if it was, it was not to be armed or equipped for warlike purposes," that would make a short end of it. They not choosing to do so, the jury would be warranted in finding against them upon comparatively slender evidence. To my mind, it would have been much better to have done so, instead of defending themselves in the way they did, which was more like defending themselves against a case, the circumstances of which they were unwilling to aver to. Why should a British merchant come and defend himself in this way if he was not doing anything contrary to the law? Why should he not have come into Court and stated what the actual facts were? That would have been the manly thing to do; and he not doing so, I think the jury would be warranted in finding against him on very little evidence.

*Sir Hugh Cairns.*—Those observations, made before I had approached the consideration of the evidence upon the case as to intent, are very difficult for me to meet.

*Mr. Baron Bramwell.*—Not at all; because it may well be that when you come to look at the evidence you may find that there is none, or none such as to call upon the person to give an answer.

*Sir Hugh Cairns.*—That is our case.

*Mr. Baron Bramwell.*—I do not prejudge the case against you; I only say if there was evidence, that would have been the becoming way, in my judgment, to have met it.

*Sir Hugh Cairns.*—I have not yet approached the evidence or completed my statement upon it, or submitted what I have to submit, or stated the reason why, supposing those defendants were ever so examinable, in my judgment there was no case to call upon them to be examined. Upon the first part of the case with which alone I am now dealing, the case as to the guns, I wish your Lordships to indulge me by allowing me to show what the conclusion was that was drawn by the Attorney General himself, as to the evidence upon the subject of the guns, which alone is the evidence which up to this point has been brought before your Lordships upon the subject. The Attorney General, at page 215, said this, "Then my learned friend came to the matter of the guns. You would understand from the question put to the witness from the workshop of Messrs. Fawcett and Company, that it was supposed, at least, that some connexion would be traced between the 'Alexandra' and certain guns. Now, I am bound to admit that, strictly speaking, we failed in tracing that connexion." I will read something more that followed, but at this point I ask your Lordships, Could it be pretended for a moment, after that statement by the Attorney General, or after

a state of things which warranted that statement by the Attorney General, that there was any necessity whatever for those against whom this accusation is brought, offering themselves to be examined on the subject. There is the confession of the Attorney General himself that they had failed to trace the connexion, and he coupled that with an observation which I will give the Crown the benefit of. I will shorten what he says, though it runs through several pages. He says, Although I am bound to admit that we have failed in proving the connexion between the guns and the "Alexandra," I have to set against that what I am now going to put to the jury; the Attorney General proceeded to say, It appeared in evidence that there had been certain drawings of either those guns or gun carriages, and the Crown were of opinion that if those drawings were produced something might appear upon the face of them (there is no evidence that anything would appear upon the face of them) which would be material to the case. And then the Attorney General said, being in ignorance of what had passed at the trial in his absence, that notice had been given to produce those, and Fawcett, Preston, and Company had not produced them in answer to the notice. The Attorney General was ignorant for the moment that in the course of the examination while he was out of Court, Fawcett, Preston, and Company had been called upon by notice to produce those drawings, and it was urged by counsel that no proper notice had been given to produce them, and it was so ruled that no proper notice had been given; and accordingly when during this reply of the Attorney General I took leave to interrupt him and inform him of that, the result was this,—at page 218 he continued his address to the jury in these words, "I must take it that we have not put ourselves in the position to insist on the production of this, and indeed if we had done so they still might have withheld it; and inasmuch as the witness had no recollection on the subject, we could not give any secondary evidence as it is called. You have it that no strict proper notice was given, and under the circumstance the drawings were not produced." The Attorney General in effect said this: I admit that we have failed utterly in proving any connexion between the guns and the "Alexandra," but I wish you to consider, he said at first, that there was a document that might have been produced, but was not. The Attorney General finally, very fairly, as everything he said and did upon the trial was fair, said, "I am bound to admit here that we had no right to call for the production of that document." And there it ended. That was a complete abandonment of everything upon the question of the guns, as if the Attorney General had struck the count upon that subject out of the information. Therefore, my Lords, I desire to take that matter by way of addition to the observations which I have to make upon the condition of the ship in other respects. I think I shall have your Lordships' judgment that we may strike out of the case altogether all considerations on the subject of

ARGUMENT.

2nd Day.

ARGUMENT.  
 2nd Day.

those guns ; the matter will then rest upon the structure of the ship (which I have already addressed your Lordships upon), and the other matters, the machinery, the masts, and the hammock nettings. I have submitted all the observations which I had to make upon them.

That ends (and I regret it has not been in my power to do it more shortly) all that I have to say upon the branch of the case which relates to the condition of the ship, and to the words of the statute, "equipping, fitting out, furnishing, and arming." I have now to deal with a branch of the case altogether separate, but which opens up, perhaps more than the first part of the case did, the question of the evidence relied upon by the Crown ; I mean the part of the case as to the intent, the Act of Parliament requiring, in order to constitute the offence, not only that there should be an equipping, fitting out, furnishing, and arming, but that that should be done with the intent that the ship should be employed by one belligerent power to cruize and commit hostilities against the other.

In coming to that part of the argument, your Lordships will at once, I think, see that the question of intent is immaterial, if my view upon the first part of the case is correct ; If the view which I present to your Lordships upon the first part of the case is correct, namely, that there must be an equipment or an attempted equipment of a warlike character in fact, and that there was none such in this case, then the secondary question, namely, the use that was to be made of the ship as between one belligerent and another, would of course become utterly immaterial ; it is only on the supposition that the ship was in a condition to comply with the earlier part of the clause that we have to approach and consider this second question. Now with regard, my Lords, to the species of intent which is to be proved in a case of this description, we have a statement in one of the American authorities, which I am very willing to refer to, and very willing to be governed by, I mean in the case which I have already mentioned upon another point, Quincy's case, reported in the Appendix to this book, and the page I am now referring to is page 79. Your Lordships will find towards the top of page 79, the instruction which the Court thought should in Quincy's case be given to the jury upon the question of intent : " We think these instructions ought to be given : The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States, and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention, not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character."

Now the instructions were the second and third occurring immediately before that at the bottom of page 78, and they were the instructions asked on the part of the defendants, "That if the jury believe that when the 'Bolivar' was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies in search of funds, with which to arm and equip the said vessel, and had *no present intention* of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies to endeavour to raise funds to prepare her for a cruize, then the defendant is not guilty. Or if the jury believe that when the 'Bolivar' was equipped at Baltimore, and when she left the United States, the equipper had *no fixed intention to employ* her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the defendant is not guilty." The Court thought that those instructions should be given with that comment upon them which I have read to your Lordships.

ARGUMENT.

2nd Day.

My Lords, in addition to that, I will show your Lordships the view that was taken at the trial by the learned Attorney General as to the character of the intent that was necessary in this case. Your Lordships will find that at the close of his reply at page 226, about 16 lines from the top of the page, the Attorney General says to the jury, "I ask you to give your conclusion in this case on the evidence, and I will state at once what I intended to have stated a little earlier, that so far I agree with my learned friend that the intent must be an intent of one or more having at the time, the means and opportunity of forwarding or furthering such intent by acts. I agree that anything else, called an intent, or that which would be called an intent in the mind of any person not of this description, must be treated properly as a mere wish, imagination, or desire. By 'intent,' undoubtedly the Act means practical intent." My Lord, that was more especially with regard to a question which arose in the course of the trial, as to whether the intent, even if proved to have been in the mind of any person, such as a workman or an agent, who had not himself the power of control over the ship, who had not the means of ordering her course or her employment himself, whether an intent of that kind would be sufficient, and, so far as I understand the words which I have read, we were agreed ultimately that the intent of a person of that kind would not be enough; it must be an intent entertained by some one who has the power to give effect to the intent, being a person having the ordering and control of the vessel. Well, my Lord, that, I think, leads one to observe that it is of course almost upon the surface of a case of this kind that we should have a right to require the Crown, in alleging an intent of this sort, to state who it is who is said to have entertained, and to have harboured the intent. A great number of persons' names were mentioned, both in the information and in the course of the trial. There was the name of

ARGUMENT.  
 —  
 2nd Day.  
 —

Mr. Miller, the shipbuilder ; there were the names of the firm of Fawcett, Preston, and Company ; there were the names of another firm which your Lordships have heard of, Fraser, Trenholm, and Company ; and there were the names of certain other persons who did not belong to either of those firms, and we certainly did complain at the trial of the course which was taken by the Crown in this matter. We complained that the Crown in opening their case did not at all, to use a Scotch phrase, condescend upon any one or more of all those persons as the one who entertained, or the more than one who entertained this intent. The Crown simply said, we will show you a great deal of evidence of something done by one person, and a great deal of evidence of something done by another person, and it will be quite clear to you that some one intended to do that which we allege, and you may pick and choose and decide for yourselves among whom the intent existed.

It is on this part of the case that I desire to state to your Lordships the grounds upon which we contend that this was a case in which it was in no way incumbent upon the claimants for whom I appear, even if they were examinable as witnesses, to tender themselves for examination. My Lords, if I were moving here for a new trial ; if I were the party moving, and not the Crown ; if I,—having had a verdict passed against me, holding that the facts alleged against me in the information were proved,—were moving for a new trial, and came before your Lordships with a critical examination of the evidence that was given in the case, and said, This witness does not prove the case to demonstration, and that witness adds very little to what the first has said, and if—carefully weighing the words of the witnesses for the Crown—I said, now upon that evidence I call upon your Lordships to say that the case was not proved, and that the jury ought not to have returned a verdict against the claimants, I then could understand the Court saying to me, Are you in a position to maintain an argument of that kind ; would not it have been better for you, if there were any doubt about it, if the matter could have admitted of any doubt or argument, to have at once removed that doubt by putting the claimants into the box, and having them examined, and so removing the doubt ? That would be an observation, the weight of which would naturally be felt ; but when I am coming here to show cause against a rule obtained by the Crown, when I have received the verdict of the jury in my favour, when the Crown challenge that verdict, and say it is against the evidence, or against the weight of evidence, the Crown having had the opportunity of laying before the jury the whole of their views as to the claimants not having been examined as evidence in the case, then the case becomes altogether altered. The question then is, are the Crown able to satisfy your Lordships upon this evidence that it was impossible for the jury to have come to a proper conclusion in returning a verdict for the claimants, and that the jury ought to have come to a different conclusion. The jury

having given a verdict as they did, knowing that the defendants were not examined, and having heard every observation that could be made upon that circumstance of their not being examined, is it to be said on the part of the Crown that the verdict is against evidence, and ought to be set aside by your Lordships upon that ground? At the trial I maintained, and I take leave to say to your Lordships, that where the Crown proceeds for a forfeiture, or in the case of a misdemeanor, no matter whether the defendants can be examined or not, it is the duty of the Crown to prove the case which it alleges. I do not say to prove it to demonstration in the way that a proposition of mathematics is proved, but in a way to commend itself to the mind of any reasonable man, and that it is not open to the Crown, in properly conducting a trial of the sort, to say, We will launch our case; we will show you that which is merely a scintilla of evidence to go to the jury; it is nothing like sufficient. We agree it is not anything like sufficient proof, but if you find that the defendants do not come forward and clear themselves of the charge we make against them, we call upon you to find a verdict for the Crown. I hope the day will never come when that course will receive sanction from anyone sitting in your Lordships' place of judgment, as I am satisfied that it would never receive sanction from any jury before whom such a case might be tried.

Now, in showing cause against a rule which asserts that the verdict is against the weight of evidence, I must state this to your Lordships. We, at the trial, not only maintained that the evidence, as it was given, did not prove or approach to proof of the case of the Crown, but we challenged the credit and credibility of the witnesses examined upon the trial. Of course we may have done that without sufficient ground, or with sufficient ground. I say, and submit with confidence, that we did it upon ground that was amply sufficient. The witnesses examined upon the trial, upon this part of the case, are eight in number—five of them were workmen who were discharged from the works of Messrs. Miller or Messrs. Fawcett, Preston, and Company. Of course that would not be conclusive against them. Two more of the eight were, beyond all dispute or controversy, spies and informers, and they were something more than spies and informers; they were persons who, in order to obtain their information, had affected to act as if they were assistants of, and sympathizers with those from whom they were seeking their information. The eighth remaining witness was one described by my learned friend, the Attorney General, here, as a very straightforward witness, whose evidence was not in any way shaken. He was a person whose evidence I will give your Lordships in detail, and as to whom, I venture to say, we were entirely correct in imputing to him what we did; that his evidence was evidence, which, upon the point upon which it was material, was utterly incredible.

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

Now, before I go into a reference to the evidence of those eight witnesses, I may state that there were some matters in the case which were beyond all dispute. In the first place, as regards the place where this ship, the "Alexandra," was lying; as regards the work that was being done upon her, and as regards the work in preparation for her, the engines, and the adjuncts of the engines, in the works of Messrs. Fawcett, Preston, and Company, there was this remarkable fact; the whole thing was perfectly open. The witnesses who had the charge of the yard where she was building, said there was no particular pass required for anyone to come in; anyone was at liberty to come in who wished to see anything in the yard; there was no concealment practised; the matter was open to the light of day. So also with regard to the works of Messrs. Fawcett, Preston, and Company, we have it upon the evidence that persons wishing to see the works were allowed to come in, and a great number of people were in the habit of coming in, and looking about and seeing everything that was going on. Of course the matter was still stronger when the ship was taken out of the yard of Messrs. Miller, and removed to Toxteth Dock, one of the principal docks in Liverpool, where the work was continued upon her till she was ultimately seized; the whole thing was done in a public dock. And this fact is the more important when it is observed, as was perfectly clear upon the trial, that while this was being done, it was well known, publicly known, that exertions were being made to quarrel with the construction and preparation of ships, wherever those concerned for the United States Government thought they could do it; that proceedings had been taken or threatened with regard to the other ships I have mentioned. And therefore, it was perfectly notorious in the neighbourhood where the ship was building, that any breach of the law would be made the subject of proceedings if it could properly and safely be done.

The persons as to whom I must ask your Lordships to consider the evidence for the purpose of seeing who it is among them all that could be said to have harboured the illegal intent which is relied upon in this part of the case, are the following. There was first, Mr. Miller, who was the builder and the owner of the dockyard; in the second place, I put the firm of Messrs. Fawcett, Preston, and Company, which consisted of a number of members, and I will take them separately; in the third place there were a body of names whom I will take together, the firm of Messrs. Fraser, Trenholm, and Company, and three gentlemen who were proved to be in communication with that firm, namely, Captain Bulloch, Mr. Tessier, and Mr. Hamilton.

Now, my Lords, there is a considerable part of the evidence which I can entirely relieve your Lordships of, because upon that there will be no controversy between my learned friends and myself. I agree that the evidence in this case showed that the firm of Fraser, Trenholm, and Company were persons who had



communications with and transacted business for that Government which is called the Confederate States of America. The business they were proved to have transacted for the Confederate States of America was the business of bankers; they made disbursements upon their order, and the other three persons, whose names I have mentioned, Captain Bulloch, Mr. Tessier, and Mr. Hamilton, were proved to have had intercourse and communication from time to time with Messrs. Fraser, Trenholm, and Company, chiefly upon those financial affairs of the Confederate States. Therefore I do not propose to read any of the evidence as if there were a controversy upon that point; my proposition would be that that is entirely immaterial to the case that I have to present with regard to the vessel and those concerned with her. I deny that there was any kind of connexion proved between Fraser, Trenholm, and Company and the "Alexandra," and that is the point to which we have to direct our attention.

ARGUMENT.

2nd Day.

My Lord, I will take first, with your Lordships' permission, the five workmen, whom I will call the discharged workmen from the works of Miller or of Fraser, Trenholm, and Company; and when I use the phrase "discharged workmen," I will state what I mean by the phrase. Some of them were discharged because they were said to have been drunk, although of course they contended it was entirely a mistake; others were discharged because they struck for higher wages; but the fact was, that they had been in the works and had left the works on those grounds—they were what we call discharged workmen. Acton was the first of those, and your Lordships will find the part of his evidence that I refer to at page 21. He says, just at the bottom of that page, that he had been employed by Miller and Sons. "How were you employed by them?—As a watchman, night and day. When was that? When did you begin to be employed as night and day watchman?—Fifteen months ago; rather better; somewhere about that. When did you cease to be employed by them?—About six or eight weeks ago. When you were in Messrs. Millers' service, do you recollect the 'Alexandra' being constructed?—Yes. Built in their yard?—Yes." Then a question arose about the line of examination, which occupied a considerable time; and we pass on from page 22 to the resumption of the examination at page 32. At page 32, rather more than halfway down the page, he is asked, "Do you know the firm of Fawcett, Preston, and Company?—Yes. Do you know any of the men whom they employ by sight?—No. Do you know a person of the name of Hamilton, a Mr. Hamilton?—I have seen him. Have you ever seen him in Messrs. Millers' yard?—I have. Have you ever seen him there during the course of the building of the vessel 'Alexandra'?—Yes. Have you seen him there more than once?—Yes. Frequently?—Yes. You say, frequently?—Yes. Can you tell at all how often?—Yes, once

ARGUMENT.

2nd Day.

" a week, or twice a week. Did he take any notice of the  
 " 'Alexandra' (I do not ask you what) when he came into  
 " the yard?—Yes, a little. Did anybody come with him?—Yes.  
 " On those occasions?—Yes. Do you know the name of that  
 " gentleman?—Bulloch, I believe. Did they ever look at the  
 " 'Alexandra' together?—Yes. More than once?—Yes. Be-  
 " sides looking at her, did they do anything with respect to  
 " her?—No. I do not ask you what; did they give any orders  
 " respecting her?—Not that I am aware of. *Lord Chief*  
 " *Baron.*—They did nothing but look at her; they gave no orders?  
 " —No. *The Queen's Advocate.*—Did you ever hear Mr. Hamilton  
 " speak to Mr. Miller upon the subject of the 'Alexandra'? I  
 " do not ask what he said, but did you ever hear him?—Yes.  
 " Did you hear him do that more than once?—Yes, once at  
 " least. Did you ever hear this person of the name of Bulloch,  
 " that you have mentioned, speak to Mr. Miller?—Yes. Upon  
 " the subject of the 'Alexandra'?—Yes. Do you know a  
 " Mr. Mann?—Yes, I do. What firm does he belong to?—Messrs.  
 " Fawcett, Preston, and Company. Have you ever seen him on  
 " board the 'Alexandra'?—I have. When?—At different times.  
 " While she was in course of construction?—Yes. Have you  
 " ever heard him give any orders respecting her?—No. Did you  
 " say you had seen him more than once?—Yes. How often do  
 " you think you have seen Mr. Miller on board the 'Alexandra'?  
 " —It might be three or four times. That was while she was in  
 " course of building in the yard?—Yes. When he came, did he  
 " stay a short or a long time when he was on board?—Perhaps he  
 " would be an hour or half an hour. On board the 'Alexandra'?  
 " —To and fro. Did you ever see him go on board any other  
 " ship when he was there?—I do not recollect it. As to Mr.  
 " Bulloch and Mr. Hamilton, when they came to the yard, how  
 " did they get in?—Through the yard gate. Who let them in?—  
 " Myself, for one. *Lord Chief Baron.*—You mean they got in  
 " exactly like other people?—Yes; just so. *Queen's Advocate.*—  
 " Did they have an order, or did they come in like anybody  
 " else?—They had an order from one of us. Was that the  
 " order usually given to everybody, or was it a particular  
 " order?—No. What was it?—Generally an order for them  
 " to go through, that is all?—Was it the usual or was it a  
 " particular order?—Not a particular order. *Lord Chief Baron.*  
 " —Had the order anything to do with the 'Alexandra'?—Not  
 " that I am aware of. Was it merely to let them into the yard?  
 " —To come into the yard. *The Queen's Advocate.*—When Mr.  
 " Mann came, did you see him go on board the 'Alexandra' in  
 " company with Mr. Bulloch or Mr. Hamilton at any time?—No."  
 " In his cross-examination he is asked, "Let us understand  
 " what you were exactly; you were a watchman, were not you?—  
 " I was. You had nothing on earth to do with building ships?—  
 " No. I believe your duty was to stand at the gate?—Yes.  
 " And you continued that duty until you were discharged?—

" Yes. When did Mr. Miller discharge you?—I do not know.  
 " You have not the least notion when that was?—No. That  
 " you swear?—Yes. You are sure you were discharged?—Yes.  
 " You tell these gentlemen that you have not the least notion  
 " when?—No. When, not why, is my question?—On the Thurs-  
 " day, perhaps it might be. Last Thursday, was it?—No. When  
 " was it that you were discharged from Messrs. Millers'?—I do  
 " not know. When was it done?—When I was leaving the  
 " office. How long ago?—That makes all the difference; per-  
 " haps six weeks. After you left them, what did you do?—  
 " Nothing at all. And you have been doing nothing ever  
 " since?—Yes, I have done something. What have you been  
 " doing since?—Driving a car."

ARGUMENT.

2nd Day.

Then I pass over the part of the examination which relates to his communication with a person named Barnes, and a detective officer, and at page 35 he is asked, "How many months were you there?" that is in the yard. "Twelve or fifteen months. A good many people come to the yard on business?—Yes. A great many in the course of the day?—Yes, they do. And your place was at the gate, not in the yard among the ships, was it?—No. In the gate?—Generally. You say you believe that Mr. Bulloch came?—Yes. What do you know of Mr. Bulloch; did you ever see him; how do you know it was Mr. Bulloch, the person who came? —He is a little man. How do you know that it is Mr. Bulloch?—I do not know that it is he. It is easy to say Mr. Bulloch came there; how do you know it was Mr. Hamilton came?—I saw him. How do you know him?—I know him perfectly well. How do you know him?—I know him. Did you ever speak to him in your life?—Yes. What did you say to him?—I do not know. You let him through the gate and out again, did you?—Yes. Is that what you know of him?—Yes. Is that all you know of him?—Not exactly. Did you ever speak to him except when letting him through the gate and out again?—I have at other times. When you went into their service as watchman, had you been in the police force?—I had. How long had you been out of the police force when you went as watchman?—I cannot say. Have you got the least notion?—No. Not the least?—No. Several years?—No. Several months?—Perhaps 18 months, as near as I can state." In his re-examination he says, "You mentioned a person of the name of Bulloch; was he called 'Bulloch' in your hearing whenever he was spoken of?—I cannot say. Did you ever hear him called by his name?—I do not know. Did persons give any name when they entered the gate at your master's building yard?—Yes. Did you take their names?—Sometimes they might and sometimes they might not. Sometimes the names were taken?—Yes, some of them. While you held your place, was any name given by this person whose name you say was Bulloch?—*Mr. Karslake.* —What do you mean by that?—*Mr. Attorney General.*—

ARGUMENT.  
 2nd Day.

"Given by Mr. Bulloch?" The witness says no. "Am I to understand that Mr. Bulloch never did to you give a name?"—"No. Are you sure that he came with Mr. Hamilton?—I have seen him with Mr. Hamilton." He describes Mr. Bulloch as being a little man with dark whiskers and beard, and he says that he cannot speak to his dress.

As to the matter about Bulloch, though it is a small part of the case, it is singular that having called this witness Acton, who said that he could not speak from any knowledge as to his name being Bulloch, but describing the appearance of the person called Bulloch, they at a later stage of the trial produced a gentleman called Clarence Randolph Yonge, who was perfectly familiar with Bulloch, who was not asked the question at all what was Bulloch's appearance, even if that were a satisfactory way of identifying the person spoken of. The question was not put to him in any shape or form. But Acton is not done with, because your Lordships will find that he was recalled at page 113, there having been considerable controversy in the meantime as to whether Acton could be asked if he heard Mr. Miller say anything as to the destination of the "Alexandra," or as to the character of the ship.

With regard to her destination, he is recalled at page 113, and the Attorney General asks him, "You told us yesterday that you were employed in the building yard of Mr. Miller, of Liverpool, while the 'Alexandra' was being built or was on the stocks?"—"Yes. During the time you were there, did you ever hear the elder Mr. Miller speak of the 'Alexandra,' or describe her as a vessel of any particular class or kind?"—He said, "No." The Crown thought that he was going to give an important statement, but it turned out that he had never heard anything of the sort. I must anticipate what your Lordships will find in another witness's evidence in order to explain what is stated by Acton. Your Lordships will find that side by side with the "Alexandra" there was being built a steam vessel called the "Phantom," which was being built for the Confederate States; I have not the least idea what particular employment she was to be used in; but no person suggested that there was any illegality about her. She was built as a common ship, and no one suggested that there was any illegality in her building. If it be true that Mr. Hamilton was a person engaging himself in and occupying himself about business connected with the Confederate States, of course nothing could be more natural than that he should go into that yard, where a boat like the "Phantom" was building side by side with the "Alexandra," and look about and see both the vessels; but all that Acton could say was, that he had seen Mr. Hamilton, and that he had seen the person he called Bulloch, and that they walked about the yard and looked at the vessels building. That is the whole of the evidence so far as Acton is concerned.

*Mr. Baron Bramwell.*—Are you contending now that there was no sufficient evidence,—I mean no strong evidence, that the

vessel was intended for the Confederate States at all, armed or unarmed? ARGUMENT.

*Sir Hugh Cairns.*—I am contending that the verdict was not against evidence, supposing the verdict to have proceeded upon that ground. 2nd Day.

*Mr. Baron Bramwell.*—Suppose the jury said, in their own minds, Well, we think she is meant to be armed or equipped for warlike purposes, but we are not satisfied that she is intended for the Confederates. You say that that would not have been a verdict against evidence?

*Sir Hugh Cairns.*—Yes; we cannot tell what was passing in the minds of the jury; they might have proceeded in their own minds, either upon the first ground, or the second, or both; they might have virtually found for the claimants, that the ship was neither equipped nor intended to be equipped in a warlike manner; they might have found for the claimants, that she was not intended to be used in the service of the Confederate States, to cruize or commit hostilities against the United States; they might have determined either or both those things in favour of the claimants, but we are challenged by this rule virtually to meet the Crown on both parts of the case.

Now Barnes, whose evidence is at page 36, is the second of those workmen. He also is a workman who had ceased to be in Messrs. Miller's employment. He is asked, "When did you go into Miller's employment." He says, "It is turned four years since first I went into their employment." He says he left them nearly three months ago; that he got a sup of drink and went away from his work. He says that he recollects a ship called the "Oreto," that she was built by Messrs. Miller. He is asked, "How long ago is that?—I think it would be about 16 months since she went away. Was she launched about 16 months ago?—Yes, I think so; I am not exactly sure." He says that he recollects two gunboats, called the "Penguin" and the "Steady," being built in Messrs. Miller's yard. Then he says that was about three years ago. Then he says, "At dinner time and breakfast time I used to go about and have a look at them. I used to go on board sometimes."

*Mr. Baron Pigott.*—Are we to understand that you are contending that there was evidence to justify the verdict in either view of your argument as to the meaning of the 7th section of the Act?

*Sir Hugh Cairns.*—Quite so, my Lord.

*Mr. Baron Bramwell.*—As I understand further (I do not know whether it is so), you say, that if the jury had turned round and said (supposing they had given, or had been obliged to give, a reason for their verdict), that they found for the claimants on the ground that they were not satisfied that this vessel was for the Confederates at all, it would not have been a verdict against evidence.

*Sir Hugh Cairns.*—Just so.

*Lord Chief Baron.*—It is open to you to make that contention,

ARGUMENT.  
—  
2nd Day.  
—

but I never, that I am aware of, raised the question in my summing up, that it was intended for the Confederate States. I think you will find, in the way I put it, that there was nothing at all in any way pointing to that.

*Mr. Attorney General.*—That is so, my Lord ; and it is one of the grounds of our present rule.

*Lord Chief Baron.*—I did not raise the question as not being material. The point I put to the jury was this,—Do you believe that there was any intention of doing the act quite apart from the intent? Was there an intention to do that, a commencement of that which, when perfected, would be either a fitting or furnishing or equipping or arming of the vessel—no matter with what intent—to go against anybody? Would it be, in that condition, so as to be (taking a reasonable view of it) within the meaning of the words—equipped, or fitted out, or furnished, or armed? Because, if it were so, it is a matter of perfect indifference whether it was for the Confederate States or not.

*Sir Hugh Cairns.*—Quite so. I took leave to say, in approaching the second part of the case, that it became altogether immaterial if we were right upon the first part of the case. But we certainly conducted the case at the trial upon the assumption that we might succeed upon both parts of the case if necessary, or upon either part of the case. And it is with that view, I being in this difficulty, that of course we have not the slightest idea of what case the Crown may make when they come to be heard before your Lordships now upon the rule which they have obtained, which alleges that the verdict is against evidence, that I desire to ask your Lordships to consider how the evidence stands upon this point. I will take leave afterwards to apply it, so far as is in my power, to the charge of the learned Chief Baron.

*Mr. Baron Bramwell.*—I take it that your opponents, in order to entitle themselves to a new trial on the ground that the verdict was against evidence, must show that it was against evidence upon every one of the points necessary for them to establish.

*Sir Hugh Cairns.*—So I should expect. That is a question wholly distinct from the ruling of the Lord Chief Baron. They must, in order to maintain that the verdict was against evidence, assume that the direction was correct, because otherwise there would be no occasion to go upon this ground at all, and therefore it was that I was endeavouring to pursue the line which I am glad to find your Lordship thinks the correct one.

*Mr. Baron Bramwell.*—Let me see if I appreciate this rightly. Do I rightly understand you to say that there must have been an intent on the part of the builder that the vessel should be armed and used?

*Sir Hugh Cairns.*—By the one belligerent to cruise against the other?

*Mr. Baron Bramwell.*—Yes.

*Sir Hugh Cairns.*—No, my Lord, I should rather say the con-

trary. What I took leave to submit to your Lordships with reference to this part of the case was this: following the words of the late Attorney General, that the intent must be a practical intent, that is to say, an intent entertained by some person who has the power to put that intent into execution, and then applying that to your Lordship's question as to the case of a builder, I take it to be clear that if I order a builder to build a ship for me, what he may intend about that ship has nothing to say to the question—he is not a person who can entertain a practical intent within the meaning of that definition.

*Mr. Baron Bramwell.*—I will tell you what is in my mind. I only want to see what your understanding about it is. Supposing a man gives an order to a builder to build a ship, and says, All I require is that you should build her, fit her, equip her, arm her, and deliver her to me; the builder would say, I had no other intent than to build the ship and make a profit on the transaction; that was my intent. But suppose it manifestly appears that the person who gave the order, and who got the vessel, intended directly to use her to cruise and commit hostilities against some person within the Act of Parliament, would you say the ship could be seized or not before she was completed, and before any property passed from the builder to the purchaser?

*Sir Hugh Cairns.*—What I should say is, that the question there would become the intent of the person who gave the order; that in that case the intent of the builder would be quite immaterial; but in order to explain what I wish to submit to your Lordships, suppose this case—suppose, first, that a man orders a ship; that the ship is to be built in a particular way, of a particular construction, and if you like, of a warlike character. The builder receives those orders, and the builder chooses to say, I have no doubt whatever that the ship is intended to be employed in a particular way, and I proceed throughout the building of her with a full understanding on my part that she is to be so employed. I say the builder may be right or wrong in what he speculates upon and conjectures, but the state of his mind upon the subject is irrelevant; it is not the point; he may be perfectly accurate or inaccurate; that is not the point we must go to; we must endeavour to ascertain the mind of the man who has the power to carry the object of his mind into execution; that is not the builder. That is all my observation went to. A very difficult question might arise, which I do not believe arises in this case—a question of this kind.—A person orders a ship to be built, such person having the mind to employ the ship in the service of one belligerent to cruise against the other—the builder is entirely ignorant of that intent, knows nothing about it, and thinks nothing about it, and the property in the ship up to a late stage in its construction is still in the builder; the question is, whether the intent of the person who put the builder into motion can lead to the forfeiture of that which is the property, not of the person who gave the order, but of the builder who has

ARGUMENT.

2nd Day.

ARGUMENT. not yet given up the ship. If that question were put to me by one of your Lordships, the answer I should humbly give would be (though not arising in the present case), that it would not lead to forfeiture, that the builder would have up to the very last moment a *locus penitentie*, and that he might say, I have discovered what I never thought of before, for what purpose they are going to use this ship, and I will not fulfil the contract, and will not hand it over.

2nd Day.

*Mr. Baron Bramwell.*—There seems to be considerable difficulty in the matter, because as I understand, whenever an offence is committed by a person against this seventh section, then the ship is forfeited. In the case you put of an innocent builder and a guilty orderer, the guilty orderer would be guilty within the Act, because he would be the person who procured the fitting out with intent. Therefore, though it might be that you could not maintain an indictment against the builder, still the ship would be forfeited. There is enough in this case, without embarrassing it with further questions; but I want to appreciate the ground which you take.

*Sir Hugh Cairns.*—It is absurd for me to be presenting views of a case that does not arise; but I should say in that case, the person who procured the act to be done would be subject to an indictment, but that the property would remain in the builder. The builder would be innocent; he would have a *locus penitentie*, and an opportunity of delivering up the ship, and there would be no forfeiture.

*Mr. Baron Bramwell.*—If you say it does not arise, it must be upon the assumption that if the intent can be brought home to any one of those persons, either the builder or Bulloch, it would be sufficient.

*Sir Hugh Cairns.*—To that I should answer in the same way, If it be proved that Bulloch was the person who had the control of the ship, the ordering of the ship, and that he intended to use the ship in a particular way that might lead to the forfeiture of the ship which is thus proved to be under his control and direction, that may be so; but your Lordship has now referred to certain considerations which fortify, I take leave to say, immensely what I ventured to submit to your Lordships at the outset, namely, how extremely important it is that it should be definitely fixed and definitely alleged and proved whose is the intent which is said to lead to the forfeiture, because otherwise we are floating about in perfect obscurity. I took leave at the trial to object to the learned Attorney General, never condescending upon any name in particular, but leaving the forfeiture to be sought for wherever it could be found. I say we ought to be told who is the person in particular who is said to have had the control of the ship, and to have harboured the design.

I was calling your Lordships' attention to Barnes's evidence, which I now proceed with; at page 37 he says he recollects the screw steamer, the "Alexandra" being built in Messrs. Miller's yard; that at dinner time and breakfast time he



frequently went over her while she was building; that she was like the other gunboats, only smaller; that she was like the "Oreto," only smaller; that he recollected during the time the "Alexandra" was being built, Captain Tessier coming to the yard. He is asked "Who was he?" He says, "I believe he was the captain of the 'Phantom.'" This is what led me to make the observation I did as to the "Phantom." I said I would assume it was proved that Captain Tessier was in communication, either directly or indirectly, with the Confederate States; and here it appears that the "Phantom," a ship of which he is the captain, is building. I care not what conclusion you draw from that. That accounts very satisfactorily for the circumstance of his being in Messrs. Miller's yard. "What was the 'Phantom'?"—She was a steel boat. Was she both steel and steam?"—Yes. Where was the 'Phantom' being built?"—In Messrs. Miller's yard. Was the 'Alexandra' being built at the same time as the 'Phantom'?"—Yes. And when Captain Tessier came, what did he do; what vessels did he look at?"—He merely used to go round and have a look; he never took so much notice of the gunboat, at least of the 'Alexandra,' as he did of the 'Phantom.' Did he take notice of the 'Alexandra'?"—Yes, just looking round her; I never saw him give any instructions. You never saw him give any instructions about the 'Alexandra'?"—No. Have you heard him give instructions about the 'Phantom'?"—No, I never did. Which were the vessels he went to look at when he came into the yard?"—Chiefly the 'Phantom.' Was there any other vessel that he looked at?"—Yes, the 'Alexandra,' he used chiefly to go round and have a look. Did you know of his going round and looking at other vessels besides the 'Phantom' and 'Alexandra'?"—Yes, he used to go round and look at them all."

Your Lordships cannot fail to observe that the Crown throughout this examination expected a different answer to every one of their questions; they expected the witness to say that he went to look at no vessel but the 'Alexandra,' or chiefly at her, and that he was not in the habit of looking beyond her or going about the yard and looking at other vessels. "Have you heard him giving directions about the 'Phantom'?" do you say or not?"—I am not certain. Do you know Mr. Speers?"—Yes. Who is Mr. Speers?"—Mr. Speers is Messrs. Fawcett, Preston, and Company's overlooker." He says that he knows him. He has known him ever since he first went to work for Messrs. Miller. "Messrs. Fawcett, Preston, and Company are engineers, are they not?"—Yes. When Speers came to your yard, what used he to do? He seldom used to come unless they were boring the sternposts for the screw; he used to superintend that. "What vessel?"—In both the 'Phantom' and the 'Alexandra.'" He says that the men were boring out the sternposts of the 'Alexandra'; that he saw them doing it. Then he is asked, "What were they boring out those sternposts in the 'Alexandra' for?"—"For the screw shaft to work." Then he says that he was led

ARGUMENT.

2nd Day.

to understand that Messrs. Fawcett, Preston, and Company furnished the machinery for the "Alexandra;" that Speers, their foreman, used to superintend the boring; that it was Messrs. Fawcett, Preston, and Company's men who were there in both the "Alexandra" and the "Phantom;" that they bored out both those vessels. Then he is asked, "What was brought there to be put into the 'Alexandra'?" He says, "I did not see anything brought there, only the boilers. Who brought the boilers?—I cannot say who brought them. Where were they put on board the 'Alexandra'?"—In the dock; I did not see them put on board; I saw them after they were in. In the 'Alexandra'?"—Yes. Where was it that you saw them in the 'Alexandra'?"—In Toxteth Dock." Then he says that Messrs. Fawcett and Preston's boiler makers were there; that was about the boilers. He has seen Speers there too. He recollects the 'Alexandra' being launched in March last. He knows Mr. Mann, whom he describes; and then on cross-examination he says, at the top of page 39, that he had nothing in the world himself to do with the ship building. He is asked, "How long had you been there?"—About four years altogether." Then he says whose works he had been employed in since he left them; and about the middle of the page he is asked, "What vessels were building in the yard at the time that the 'Alexandra' was built?" He says "There was one called the 'Huddersfield.' What sort of vessel is that?"—She is an iron boat. *Lord Chief Baron.*—How many vessels were in course of building in the yard altogether?"—Four. *Mr. Mellish.*—The 'Huddersfield'?"—Yes, the 'Huddersfield,' the 'Alexandra,' and the 'Phantom.'" Then he is asked, "What sort of a boat is the 'Phantom'?"—She is a steel boat. Is she a gunboat?"—No, not that I know of. Is she a merchant vessel?"—She is like a merchant vessel." So much therefore for Barnes, who I think your Lordships will be of opinion has not carried the case much further. The only person he says he saw in the neighbourhood even of the ship was Captain Tessier, who was the captain of the vessel that was building side by side with the 'Alexandra,' and who was naturally there looking after his own vessel, the machinery of which Messrs. Fawcett, Preston, and Co. were putting in, as to which there was no dispute.

Then the third witness of this kind and the fourth are those witnesses whose evidence I have already read to your Lordships, and therefore I need not repeat it; I mean Robinson, the joiner, at page 40, and Carter, the joiner, at page 41; they were joiners employed, your Lordships will remember, in the works of Messrs. Fawcett, Preston, and Co. Their evidence went entirely to endeavour to make out a connexion between the guns and the "Alexandra," which I have already observed upon in the course of what I have read of their evidence. Your Lordships will remember they said that the machinery for the "Alexandra" was preparing in the works of Messrs. Fawcett and Company, but the machinery for the "Phantom" was preparing there too; and if

it be the case that Mr. Hamilton was a person who in any way was interested about the "Phantom," whether in connexion with Captain Tessier or not, nothing would be more natural than that he should be in the works of Messrs. Fawcett, Preston, and Company looking at the machinery being made for both.

ARGUMENT.

2nd Day.

The fifth witness (Robinson and Carter being the third and fourth) would be Hodgson, the packer, to whose evidence in part I have referred on the subject of the guns, but who also says something in addition to what he says about the guns. His evidence begins at page 48, but the passage which I will refer to in addition to what I have read already, is at page 56. He is asked this question, "You have already said with respect to the machinery, of the bolts and the clenches, that a number was given?—No, only the quality. I am not sure you understand my question; did you not state with respect to the machinery, which to your knowledge was taken on board the 'Alexandra,' and the clenches, and the bolts, that they were made by a particular number?—Yes. What was the number?—2,209. Did you ever see Mr. Hamilton inspecting that machinery while it was being made?—Yes, I have seen him inspecting it. Do you remember the night before the 'Alexandra' was seized?—Yes. Were any orders given by Mr. Speers that night for sending anything on board her?—Yes; nothing more was to be done. Was that after the seizure?—Yes. Do you recollect any orders given before which were countermanded by that order? were any orders given before the seizure to take anything down to the ship?—They came down from the workshops to the packing room. What were they?—Eccentric pump buckets and bright work. Those were to have been put on board, but were stopped?—No; they were in the packing room, and were to go down in the morning when she was seized. Do you recollect anything being done for a ship called the 'Oreto' previously?—I cannot say anything about that, because I was not in the packing room at that time. Do you remember the time that it was talked about?—Yes. At that time were you sent to carry letters?—Yes. To what firm?—To firms all over Liverpool. Among others, did you carry any from Fawcett and Company to a firm named Fraser, Trenholm, and Company?—Several." This was at the time the "Oreto" sailed, a time very long anterior to the seizure of the "Alexandra." "Was the communication frequent between those two firms?—Yes. And you often had to carry those letters?—Yes, very often. Do you recollect the time when the "Oreto" sailed?—Yes. Do you recollect being sent out with any notes the evening before?—Yes. Were there two notes?—Yes. Where were they sent?—One to Fraser, Trenholm, and Co., and the other to the Dock Company at the Quay. Did you hear either of those notes read by either of the persons to whom they were delivered?—Yes, at the Dock Company's office I did." But of course he does not give evidence of what

ARGUMENT. it was. He says, that the "Oreto" sailed the next day. Then  
 2nd Day. he is asked, "Did you see whether any members of the firm of  
 "Fawcett and Company were on board of her?—No, I was not  
 "there when they started." I do not know that I need trouble  
 your Lordships by reading his cross-examination, in which he  
 says that he was discharged on the allegation of drunkenness,  
 but that that was not a proper accusation to make against him ;  
 he says that his only business in the machinery room was to  
 wait when he was sent there for machinery, and to see if it was  
 ready.

*[The Court adjourned for a short time.]*

*Sir Hugh Cairns.*—Now, my Lords, let me sum up what seems to be the effect of the evidence of these five workmen upon the part of the case which I am now considering. Assuming it to be proved by other evidence, that Captain Tessier, Mr. Hamilton, and Captain Bulloch are brought in some way into connexion with the Confederate Government through the house of Fraser, Trenholm, and Company ; is there in the evidence of these five workmen which I have given your Lordships, any sort of connexion proved between them and the "Alexandra" which would enable any Court or any jury to conclude that they were persons in any way having a control over the "Alexandra," or having any share in the control or ordering of the "Alexandra's" movements ? What does the evidence amount to ? That having a perfectly good reason for being present in the dock or in the shipbuilding yard, for the purpose of superintending the preparation of the "Phantom," which clearly was a ship they were connected with, the "Alexandra" happened to be beside her, and that they are seen looking at the one as well as at the other, and that there being engines building in the works of Messrs. Fawcett, Preston, and Company, Mr. Hamilton is found in the works of Messrs. Fawcett, Preston and Company, looking, as the witness says, not more at the one than at the other. I apprehend it would be absurd to say as much as this, that this is evidence that would justify the conclusion, but that is not what I have to argue here. What I have to argue is, were the jury upon that evidence bound to come to a conclusion different from that at which they arrived, and is the verdict they came to against the evidence, or against the weight of evidence ?

I may be allowed to say with regard to the five witnesses, that the negative aspect of their evidence must be looked at. The Crown had the singular advantage of getting five workmen who had been employed during the building of the ship, and who were acquainted with all that had been done and said about her and her machinery ; that was a great advantage which the Crown had, and it is a singular thing, and a thing that could not help impressing the minds of the jury, to find that where the Crown had the command of five witnesses of that kind who were willing to come forward and do some service in behalf of those who called

them, during the whole of their experience of the shipbuilding yards or the works, there is no thing which they can put their finger upon, or state as something said or done, that would connect the "Alexandra" with either the Confederate States or those concerned for the Confederate States. So much for the five workmen.

ARGUMENT.

2nd Day.

Now I come to the two witnesses whom I call spies and informers, and there will be a negative aspect of their evidence also, as well as an affirmative one. The first of them was George Temple Chapman, whose evidence is at page 107. He says he is not a lieutenant in the Navy of the United States; that he has no profession; he belongs to the United States, and lately came to England, about four months ago; he was in Liverpool about two months ago. At that time he says he wished to see Captain Bulloch. At the top of page 108, he says he went to the office of Fraser, Trenholm, and Company, at Liverpool, to see Captain Bulloch. Bulloch was a person he had been acquainted with in America. The date at which he says he went to the office of Fraser, Trenholm, and Company in Liverpool was about the 1st of April. Let me advert to that date for a moment. I called your Lordships' attention, when I referred to the evidence of Black, to this fact. Black told you that on the 21st March he had been sent to observe the state of the "Alexandra," with the view to those proceedings which evidently led to her seizure. He had been put in motion by those concerned for the Government of the United States, and on the 6th of April the "Alexandra" was seized; her seizure was in contemplation, therefore, or at all events steps were taken to lead to it, between the 21st of March and the 6th of April. He says he went on the 1st April to the office of Fraser, Trenholm, and Company, to see Captain Bulloch. He says he went more than once for that purpose; that on the first occasion when he went there, he did not see Captain Bulloch, but he saw a gentleman of the name of Prioleau, that was one of the partners of the firm of Fraser, Trenholm, and Company. He says he did not transact business with him, but that he communicated with him as an American, and led him to infer that he, the witness, was a secessionist, and communicated with Mr. Prioleau, who was said to be a secessionist also, as if he was a sympathizer with him, a compatriot willing to assist him and forward his views. Then he is asked, "Did you communicate with him as filling any character?—No. I suppose I am not at liberty to ask what he said, but I will ask you, did you see anything in his office; over Mr. Prioleau's desk, did you see anything in his office?—I saw an English and another flag. What was that other flag? What the Americans call the Confederate flag. Where did you see the flag which you say was called the Confederate flag?—In his front office, where his clerks were sitting. Did you communicate with him at all about the business upon which you had come to see Captain Bulloch?—I did. Did that business relate to Mr. Bulloch's private affairs?—Partially it did, and partly to the affairs of the Confederate Government. Were you acquainted in the

ARGUMENT.

2nd Day.

"United States with a person named Clarence Yonge?—I was not." At page 109 there is one question and answer below the middle of the page to which I will call your attention. "Did you call again?—I did. When you called again did you see Captain Bulloch?—Yes. While you were at Fraser, Trenholm, and Co.'s conversing with Captain Bulloch, did you refer to these letters?—I did. And communicated with them on the subject of them?—Yes. Did the person you saw there admit himself to be the person referred to in these letters?—He did."

Now, my Lords, I pass on, because I am only taking the parts that are material for the present purpose, to the bottom of page 111. "Now, Mr. Chapman, while you were at that office, that is the office of Fraser, Trenholm, and Co., with Captain Bulloch, did any one else come in?—Mr. Hamilton. Who was Mr. Hamilton; was he a person known to you before?—Yes, he was. What was he?—The son of General James Hamilton, of South Carolina, formerly Governor of that State; and he was himself a lieutenant in the service of the United States, until the year 1861. And then what was he afterwards?—He resigned his command in the service of the United States I think early in 1861."

Now, my Lords, what have we got here? On the 1st of April, at the time when the seizure of the "Alexandra" was contemplated, that is to say, at the time that the Government of the United States were anxious that the seizure should be made, and that the ship should be detained, Mr. George Temple Chapman goes to the office of Messrs. Fraser, Trenholm, and Co., who are supposed to sympathize with the Confederate States, and he puts on a false and assumed character; he pretends that he is a sympathizer with them; that he is what is called a secessionist; he enters, therefore, into the freest and most unreserved communication with Mr. Prioleau, and not only with Mr. Prioleau but with two gentlemen, said to entertain the same views, Captain Bulloch and Mr. Hamilton.

One observation, my Lords, of course, occurs as to the affirmative view of the evidence. It is not pretended that anything whatever passed there coupling itself or connecting itself with the "Alexandra." Not a word of the kind. But I ask your Lordships negatively to consider this. There cannot be the least doubt, I apprehend, that any jury would, without hesitation, come to the conclusion that this visit to the office of Messrs. Fraser, Trenholm, and Company by Mr. George Temple Chapman was paid, beyond all doubt, to forward the views that were then entertained with regard to the detention of the "Alexandra," to procure evidence, if evidence could be procured, to couple the "Alexandra" with some person connected with the Confederate States, in order to prove that she was intended to be employed by the Confederate States. I say it is a conclusion which is irresistible, upon the facts that we have here, and which any jury would be warranted in inferring from the facts. Observe the

consequences. This gentleman goes and worms himself into all the secrets of this house, and gets into all their confidences, and yet it turns out that he is unable to say that anything whatever passed, or he was unable to act upon anything which did pass, which would in any way enable him to bring home the slightest and most transient amount of connexion between Fraser, Trenholm, and Co. or Captain Bulloch, or Mr. Hamilton, and the ship "Alexandra." I say nothing more striking or conspicuous could happen in a case of this kind than that fact, that a man who would resort to devices and artifices of this sort to obtain the end he had in view, who succeeded to a great extent, for he took in those whom he wished to defraud, although he attained his object in that way, yet was unable to obtain anything whatever which could be turned to advantage in respect to the "Alexandra." So much for the evidence of Chapman, which not only does not advance the case, but puts it back beyond any possibility of giving support to the allegations in the information.

ARGUMENT.

2nd Day.

Now, my Lords, the other gentleman who was referred to was a gentleman of a different character, a person who calls himself Mr. Clarence Randolph Yonge, and his evidence is at page 113. My Lords, I observe that the Attorney General, in moving for the rule, stated to your Lordships that with regard to Mr. Clarence Randolph Yonge, he did not mean to justify all that he did in this case. That is a very interesting observation, because it leads me to expect that the Attorney General will be prepared to justify something that Mr. Yonge did, though he is not prepared to justify all of it, and I shall listen with the greatest interest and some amount of excitement to hear whether a man alive will be found (and my learned friend the Attorney General is as bold as most men), to justify one scrap or tittle of the conduct of Clarence Randolph Yonge, as related by himself, from the beginning of the case to the end.

But my learned friend, the Attorney General, I cannot help thinking, misapprehended very considerably the observations which were made upon the evidence of Clarence Randolph Yonge at the trial. The Attorney General in his address to your Lordship on moving for this rule said, It is very true that some charges were made against this witness; it was said on the part of the claimants that he had a black slave that he wanted to sell, and it was put forward as if that should disentitle his evidence to weight. My learned friend went on to make one or two observations which seemed to be rather irrelevant, and which I cannot help thinking were not in my learned friend's usual good taste, when he said that, according to the constitution and laws of the Confederate States, this man, who was a white man, would be a perfectly good witness in any Court, whereas the slave, being a black man, would not have been a witness at all. I do not quite know why, on a trial of this kind, we should go out of our way on either one side or the other to insult the one or the other State with reference to their

ARGUMENT. laws or their constitution ; we may like them or dislike them ; it is nothing to us.

2nd Day.

But my learned friend mistook entirely, mistook beyond a mistake which I could have conceived could have been made, what was the nature of the reference to Clarence Randolph Yonge, and his dealings, amongst other things, with reference to the black slave, of which he became the owner. Fortunately I need not read the whole of this evidence. I will tell your Lordships the history of this man ; first, with respect to his public character, and then with respect to his private character. As to his public character his history was this :—He was a native of one of the Southern States of America, what are now called the Confederate States. He chose to enter the naval service of those States, and to accept the commission of an officer, and to undertake all the responsibility, allegiance, service, and good faith which that step on his part would involve. He continued for a considerable length of time, in fact for some years, an officer in the service, received his pay in that capacity, and was bound to all the allegiance which would follow from that. And not only so, but being an officer he was taken into the confidence of a person who was his superior in rank and position, a Captain Bulloch, whose name has been referred to. He became, according to his own confession, if not the private secretary of Captain Bulloch, as probably we should call him, at all events the person who was confidentially employed to copy the letters and to write the letters of Captain Bulloch, and to receive the letters sent to Captain Bulloch from those above Captain Bulloch in the employment of the Government of the Confederate States. He was familiarly employed in that way, and he became acquainted by those means with the private information which flowed from persons holding situations of this kind, such as the Secretary of the Navy of the Confederate States. He continued in that position, bearing that character and getting his information in that way, so that up to a certain day in the month of January of this year he was employed as a naval officer on board the "Alabama," (he was the purser or paymaster on board that ship) and then he deserted,—that is what we call it,—that is to say, he dropped overboard, or got on shore in some way, whilst his ship was lying at Port Royal, in Jamaica, at night, and never rejoined her. The ship sailed without him, he purposely having left the ship, in order that he might not sail with her. As rapidly as the communication between the two countries would allow he came to England, landed at Liverpool, hurried up to London, and laid the whole of the information he had obtained, in the confidential position which he had filled, at the disposal of the minister of the United States. He did that and more,—he did worse,—he volunteered as soon as he could be dispensed with here to go back to America, and pursue the same course again, in order to perform any other service of a similar nature which he could perform for the Government of the United States. That is his statement, from which I have drawn



his public character, and I am happy to think that it is not necessary for me to comment upon it. My learned friend, the Attorney General will not justify all of it,—he will probably justify some part of that conduct.

ARGUMENT.

2nd Day.

The private character of this Mr. Clarence R. Yonge was this. He was married in Georgia; his wife was living there, and he had a family by her,—he left her and embarked on board the "Alabama." While the "Alabama" was lying off one of the West India Islands, he lodged in the house of a widow having a little property, represented himself as being unmarried, and went through the ceremony of a marriage with her, which, of course, was nugatory. As soon as he had married her he sold off all her property and got the money. I am wrong in saying "all," there was one exception. She had in her employment a black servant (he would not be a slave, of course, in Jamaica), a boy of 14 or 15 years old. Mr. Yonge, the witness with whom I am dealing, after he had married this woman and got possession of all the rest of her property, represented to her that it would be a good thing to put themselves in a position to sell this boy, and for that purpose to take him to Charleston, where of course he could be sold, being a boy of colour. But then in order to persuade her to accompany him to England, he represented that the only way in which they could get to Charleston was to go to England first, and then they would go from England to Charleston by running the blockade. He, in that manner, persuaded her to come to England, and having landed with her in Liverpool, left her at Liverpool penniless and adrift upon the bounty of strangers. I do not know whether it appears upon the evidence, or not, that she had to go to a magistrate to get support. But at all events he left her there penniless, when he came up to London to give information to the United States minister. That is his private character. So that your Lordships have there united the public and private characters of this witness.

Now, my Lords, one passes with some sort of satisfaction from that subject, for it requires no sort of comment in this Court. What we submitted to the jury about this witness was this, that if he had come forward, and in the quantity of information which he was ready to give, even if he had said anything which connected itself with the "Alexandra," we should still have said, as we did say, and say I am sure in a way that no person would dispute, that no jury would for a moment attach weight or credit to the evidence of such a witness—that would have been so if he had said anything which did connect itself in any shape or form with the "Alexandra."

But, my Lord, the remarkable thing again was this, with this witness as with Mr. Chapman, he had been, as I told your Lordships, in confidential communication on the other side of the water with all who were in office on the part of the Confederate States. When I say that he had been in communication, your Lordships understand what I mean, not himself personally, but

ARGUMENT.

2nd Day.

the letters passed through his hands, and he saw everything which was passing. It was a matter which could not fail to strike any jury, I apprehend, that, with a witness of this kind coming forward to do everything he possibly could to assist the case of those who put him into the box, he was unable to suggest that directly or indirectly he, in any shape or form, had reason to think or was able to prove that there was any kind of connexion between the "Alexandra," or any design formed in regard to building her, and anything which he had seen or heard in the Secessionist States. It is true he was not in Liverpool at the time when the ship was built, but he was in a position where, according to his own account, he had full command of access to the knowledge of all the proceedings which were taking place on behalf of those who were interested for the Confederate States, and upon the whole of those occasions he could not venture to say that a single thing had ever occurred which could lead him to say a word as to the "Alexandra," or as to any idea or knowledge of his as to the purpose for which she was intended.

I, therefore, my Lords, am relieved from reading to your Lordships what I call the loathsome evidence of this witness. My learned friend, the Attorney General, may deal with it as he pleases. I make him a present of him. The witness, if he said anything which could be *ad rem* with reference to the trial, would be a witness entirely without credit. I appeal to the absence of the information which a person in his position would be anxious to give, and which he could not give, as a proof that there was nothing to be said which could connect itself with the "Alexandra."

Now, my Lords, there remains one witness still upon whose evidence the Crown thought fit to rely very much. I mean the witness Da Costa; and I may observe that my learned friend the Attorney General, who gave so very mild a character to Mr. Clarence Randolph Yonge, with regard to Mr. Da Costa soared aloft, and declared that he was a witness straightforward and unimpeachable, that he was a witness whose manner and character must have commended themselves to any one who heard him, and that he was not aware that a word could be said against the evidence that he gave. I shall take leave to present a very different view of his evidence, and certainly we went to the jury upon a view of his evidence very different from that. I venture to say that every vice of which a witness could be guilty was found in the evidence of Da Costa. He was a witness who was too willing to do the work he was called upon to do, and he was a witness who was utterly unwilling to give any information which did not connect itself with the subject of what he had in his mind to prove.

I will just give your Lordships one or two samples of the way in which this witness gave his evidence, not to ask your Lordships to draw conclusions from it, but to show the sort of evidence upon which we went to the jury, and to show how well

warranted the jury were in treating the statements of this witness, if they were relevant, as statements upon which no reliance could be placed. One thing is very remarkable in the evidence of Da Costa, that even when he was being examined in chief by the Crown, if was found impossible to control him. In answer to every question which was put to him, he would insist upon saying that the "Alexandra" was a gun-boat. And whenever the counsel for the Crown said "the 'Alexandra,'" he would answer "the gun-boat." And when one of my learned friends checked him, he said, "I know her only as the gun-boat. I will call her only the gun-boat," and he never called her anything else from beginning to end. I will give an instance: First of all, at page 65, in his examination on behalf of those who called him, he is asked at that time about some interview with Mr. Miller, "Can you say how long that was before the 'Emperor' was launched?" He says, "About a week, the last time. And in what month?—The vessel was launched on the 8th of January in this present year, and it was, I think, New Year's Day that I saw Mr. Miller. At that time did you see the 'Alexandra' in Mr. Miller's yard?—I saw that gun-boat." This is in answer to his own counsel, my learned friend the Queen's Advocate, "I saw that gun-boat." Then about three questions lower down, "Did you ever see the 'Alexandra' in Mr. Miller's yard?—I did. How long was it before the 'Emperor' was launched that you saw her there?—From September, when they laid the blocks for her; for this gun-boat." I took leave to say, "Do not call her a 'gun-boat.'" His answer is this, "I do not know her by anything but a 'gun-boat.'" And in page 99, in his cross-examination, nearly at the bottom of the page, he says this. In the last question but one he is asked, "The 'Phantom' Captain Tessier commanded, did he not?—He took her away from this port (from Liverpool). And was he generally down at the 'Phantom' at the time of her being built?—Both at the gun-boat and at her. I did not ask you that question" my learned friend says. He answers "He was at both. Was he frequently down at the 'Phantom' during the time she was building?—He was, and at the gun-boat. I did not ask you that question. I am answering you both. I ask you about the 'Phantom'?—If you ask me whether he was coming there, I must tell you what he was doing. I ask you about the 'Phantom'; you can tell us about the other; I ask you now about the 'Phantom'? He was at both vessels." The witness was excited and determined that no kind of examination, whether it came from the one side or the other, should prevent him from reiterating the assertion he came here to make. "There is a gun-boat! There is a gun-boat! There is a gun-boat! and that is all I am going to tell you about it."

Now, my Lords, what did he tell us about himself? On page 64 you will find that, on his appearing in the box, he was asked by the Queen's Advocate: "What are you by profession?"

ARGUMENT.

2nd Day.

ARGUMENT. His answer was, "A shipping agent, a ship-owner, and a steam-boat owner." One of the most eminent merchants in Liverpool, every person thought, and looked upon him with great respect for some time. "A shipping agent, a shipowner, and a steamboat owner." Surely this man must, at least in social position, be above all kinds of remark, such as might be made upon some of the other witnesses. At page 98, you will find he turned out to be this: I always understood that the term "a shipping agent" had certainly a meaning connected with commercial affairs, and the forwarding of goods. It turns out that his notion of it was this: he deals in sailors, and is what is popularly termed "a crimp;" he deals in sailors, and keeps a boarding-house connected with this sort of dealing. And as regards his being a ship-owner, he has merely a share; I do not know how much; but he is a partner in a tug that tows boats out of the docks.

2nd Day.

Now, my Lords, what have we in addition to that? Your Lordships will observe I am only giving samples. I do not want to prove facts; but I am asking your Lordships attention to a sample or two of the way in which the witness gave his evidence. If you cast your eye down page 99 (it would be improper for me to read it), I think your Lordships will see that he evidently fenced with a question, the answer to which he could not fail to have known, namely, the fact that a quarrel of some kind had taken place between himself and Mr. Miller (Mr. Miller being the person who built the tug in which he was a partner), and that Mr. Miller had brought an action, which was then pending against himself (*Da Costa*) and his partners. On that point he said that he did not know that an action was pending, but would not be sure upon the point. A very curious sort of statement, which, of course, a jury very well knows how to deal with. That was the character of the witness upon general points.

Now I will take your Lordships to the part of the evidence which was relied upon by the Crown. At page 74 this straightforward and highly respectable gentleman gave this evidence. There was a considerable discussion as to whether the evidence could be admitted; it is on the second day, at page 87, that the evidence really commences. Your Lordships will find it begins in the middle of the paragraph headed "*Queen's Advocate*," more than half way down the page. "Do you remember a short time before the '*Emperor*' was launched, having a conversation with Mr. Miller, senior?" (The "*Emperor*" was the tug boat that was being built.) He says, "Yes. When was the '*Emperor*' launched? On the 8th day of January.—1863? Yes. You say you remember having a conversation with him; and now I ask you what that conversation was?" Then a little lower down the *Queen's Advocate* says, "Perhaps I had better put it—Had he a conversation with you about the '*Alexandra*'?" He answers, "Several times. Now, then, I will ask you further, 'You had a conversation about the '*Alexandra*'?'—Yes. Did

" he in the course of that conversation say anything to you as to what the 'Alexandra' was intended for?—On three different occasions." Then an interposition as to an objection took place, and then the Queen's Advocate resumes thus, " Did he in the course of that conversation tell you what she was intended for? He did.—What did he say?—He told me she was a gunboat for the Southern Confederacy. Did he say anything to you at that time about a contract for the 'Alexandra'?—He did, my Lord; must I give you the exact words that passed? *Lord Chief Baron.*—Give us the best of your recollection of what passed. *The Queen's Advocate.*—The question is: Did he say anything to you then about a contract for the 'Alexandra'?—He said, 'We, conjointly with Messrs. Fawcett, Preston and Company, are building this vessel for Messrs. Fraser, Trenholm, and Company. Did he say for whom?—They were the agents for the Southern Confederacy.' Then I asked, "Did he say that?—Those are the words he said. *The Queen's Advocate.*—What did he say?—They were the agents; in the conversation that took place he several times said so. In the conversation that took place he said several times that they were the agents for whom?—For the Southern Confederacy. Had you any other conversations with him about the 'Alexandra,' and for whom she was intended?—Yes, certainly. What did he say at those other times?—It was the same sort of thing. *Lord Chief Baron.*—It was to the same effect?—Yes. *The Queen's Advocate.*—Were these conversations that you are now speaking to before or after the launching?—Before the launching. Were these conversations which you have last spoken to before or after the one you have mentioned?—These were after. And on several occasions you say he said the same thing?—Yes." I will postpone any observations which I may have to make upon that till I have read the whole of that which bears upon that point. If your Lordships will turn to the middle of the next page, page 89, your Lordships will find this, "Do you remember having a conversation with Mr. Miller upon the subject of the 'Alexandra' in November 1862?" He said, "I do. Do you remember whether he said anything about the name of the vessel on that occasion in November 1862?—He did. What did he say?—'Alexandra.' Tell me what he said?—He said that the vessel, the gunboat," (that is a little parenthesis of his own which always comes in) "was to be called the 'Alexandra' Did you ask him any question why she was to be called the 'Alexandra'?—I did. What was the question?—I asked him, Was that a name of some state or city, and he said it was. Did he say where it was?—He said it was in the Southern States; I think that was the word. Did he say anything about its agreeing with any other name?—He said it was in unison with the 'Alabama' and the 'Florida.' Upon this point, I will ask, did he ever speak of the 'Florida,' as you call it, by any other name?—The 'Oreto.' You have told us about

ARGUMENT.

2nd Day.

“ a conversation in November 1862; do you remember having  
 “ a conversation with him in December 1862; do you remember  
 “ having another conversation with him in the next month?—  
 “ Yes. Do you remember anything in that conversation being  
 “ said about guns?—I cannot say; I do not remember about the  
 “ guns. You do not remember anything being said about guns?  
 “ —Not in December. Do you remember anything being said  
 “ about copper?” Then he says “I said I thought we had a  
 “ great deal of copper going on board for a vessel of that size.”  
 He adds, “He said it did not matter; the parties that they were  
 “ for did not care for expense. Do you remember at any time his  
 “ saying anything to you about a gun in connection with the  
 “ ‘Alexandra’ or guns?—Nothing; only gun-boat, that is all.  
 “ That is all you remember?—Yes.” Then he says he knows  
 Captain Tessier and Mr. Welsman slightly. He knows Mr.  
 Welsman by sight. My Lord asks: “Is Mr. Welsman a member  
 “ of the firm of Fraser, Trenholm, and Company?—He is.” Then  
 he is asked, “Did you see him there more than once” (that is in  
 Mr. Miller’s yard during the time when the “Alexandra” was  
 building)?—“Yes. Did he do anything when he was there?”—  
 Allow me to call your Lordships attention to the answer “I saw  
 “ him giving orders for one of the men to work at this boat.  
 “ That is this ‘Alexandra’ you mean?—Yes. Did you see him  
 “ doing that more than once?—The order—that was only once.  
 “ Did you see him doing anything else besides giving orders?—  
 “ He was always inspecting round about. Always inspecting  
 “ do you say?—When I saw him. Do you know Captain  
 “ Tessier; I think you said you did?—Quite well. Have you  
 “ seen him there during the time the ‘Alexandra’ was being  
 “ built?—Yes. More than once?—Yes. Have you seen him  
 “ there frequently?—Yes. Have you heard him give any orders  
 “ respecting the gun-boat?—I did not hear him give any orders.”  
 Now we may pass, my Lords, to page 97, where he is asked this,  
 it is a little above the middle of the page. “I want now to  
 “ draw your attention to a particular occasion. Do you remember  
 “ after the ‘Emperor’s’ trial trip, I am not sure whether it was  
 “ after the first or the second, but it was after one of the trial  
 “ trips of the ‘Emperor,’ do you remember being in the cabin of  
 “ the ‘Emperor’ with Mr. Miller, senior?”—He says, “He was  
 “ in the cabin when I was there. Was this at the trial trip?  
 “ —*The Queen’s Advocate*.—It was after the trial trip. Was  
 “ it after the first or the second trial trip?—The second. Now  
 “ on that occasion do you remember whether young Mr. Miller  
 “ came down and called to his father?—He did.” And then,  
 lower down, he says “He told me that Captain Tessier wanted  
 “ him”; that is, Miller, senior. Then he says, “He came up,”  
 and then he says tha the (the witness) “was up close with him.”  
 Then he is asked, “And then were you and old Mr. Miller and  
 “ young Mr. Miller and Captain Tessier on deck at the same  
 “ time?—Yes. Did Captain Tessier on that occasion say any-

" thing to Miller, senior, about the 'Alexandra.' First of all " say 'yes' or 'no.' Did he say anything?—He did. What " did he say?" Then passing to the next page, below the middle, after the question was discussed as to whether it should be put or not, you will see this,—“Did he say anything as to the construction of the 'Alexandra?'" He says, "Yes. Tell us what " he said with reference to the construction of the 'Alexandra.' " —He wanted the combings of the hatch higher. That is what " he said?—Yes. Did he say how much higher he wanted " them?—Three inches, I think it was. Of what hatch?—The " main hatch. Did Miller, senior, make any answer?—He did. " What did he say?—He said he would not do it; it was according to contract." By which I understand that, as it was, it was according to contract. "*Lord Chief Baron Pollock.*— " What was done was according to contract?—Yes. But what " was proposed to be done was not according to contract?—No. " *The Queen's Advocate.*—That is, that Mr. Miller said he would " not do it, because what was done had been done according to " contract?—Yes."

ARGUMENT.

2nd Day.

Now, my Lords, there is a passage or two in the cross-examination which I will take with that. It is at page 100, about eight lines down the page. "You say you saw him" (that was Mr. Welsman) "give an order on board the 'Alexandra'?—I did not see him. Mr. Welsman, not Captain Tessier?" *The Queen's Advocate.*—No, he did not say that. *Mr. Karlake.*— "He said, 'I did not hear him give orders, he was about superintending.'" Then he is asked this question. "I observed you dwelt particularly on the word, 'saw.' Did you ever hear Mr. Welsman give an order?—I did. What was it?—He told a man to knock off; he was doing something different to his wishes, and the man did knock off." In his examination in chief, I may observe, that he said he heard him give orders to a man to work at the boat. That was the only occasion, he says, he ever heard an order given, and the order he heard given was that he ordered a man to work at the boat. His words are—"I saw him giving orders for one of the men to work at this boat." Then on cross-examination, what he says he heard was this—"He told a man to knock off; he was doing something different to his wishes, and the man did knock off. That is, he stopped work?—He stopped work and went away. Did you see the 'Alexandra' launched?—No. Do you know that she was launched on the day that the Princess of Wales came to London?—I could not tell the day; I do not know." Of course he would not venture to know anything at all so plain as that.

Now I have read to your Lordships the evidence upon this part of the case which is relied upon by the Crown. It is, as your Lordships see, evidence given by Da Costa of a statement made by Mr. Miller, the builder of the ship. That is the kind of evidence which they bring forward. The first observation that occurs upon the evidence is this: Suppose it were unimpeachable;

ARGUMENT.

—  
2nd Day.  
—

suppose there were not a word to be said against the evidence of this witness ; suppose there were no reason to ask the jury to disbelieve him, either in point of accuracy or on any other ground ; then the first question that presents itself is this : In this proceeding in this suit, what is the effect of the statement of Mr. Miller, even supposing it to have been made ? Now, there was a considerable amount of argument at the trial as to whether in the first instance such evidence was receivable at all. We, of course, objected to it, and if the result of the argument had gone the other way, we should have asked for a further consideration in the shape of a Bill of Exceptions on that point. But the Lord Chief Baron, when he came to the conclusion that in form it ought to be admitted, carefully guarded himself by saying that the question was left open as to what the effect of a statement made by a person in Mr. Miller's position might be upon other persons who were no parties to the statement. Then the point may be put thus : You have a person like Mr. Miller, who, upon the evidence of Da Costa himself, is building a ship by contract, involving, therefore, the necessity that he is building it as the person employed by some person or persons who are his employers. Therefore, I submit that, whether in point of form the evidence is admissible or not, at all events it is an observation which occurs upon the effect of the evidence, that if you find a statement alleged to have been made, and believe it to have been made, by Mr. Miller, the person building the ship by contract, just as the intent of Mr. Miller, if he is only employed in building the ship as an agent would not be material within the purview of this Act, so *a multo fortiori* a statement made by Mr. Miller in the course of his building, that the ship is to be used for a particular purpose, must be a statement which if received can affect no person who is admitted to have a property in the vessel. I should submit that, if there was not a word to be said against the accuracy of Da Costa in general, any statement made by him as to what Mr. Miller, the builder, said, would not weigh a feather as against the persons who have the property in this vessel.

Again let me ask your Lordships to observe what the jury had to consider, and what was put to the jury broadly and clearly. There was a witness whose manner and character had the observations to be made upon them which I have made. And now take the statement he himself makes of this conversation ; is that a statement which upon the face of it ought to be received by the jury as true ? Can anything so wholly foreign to the ordinary course of business among mankind be supposed as that which this witness tells us ? He was a person not in any way particularly intimate with Mr. Miller ; the only connexion he had with Mr. Miller, the only ground he had for being present in the yard was that he, Miller, was building a tug in which he. Da Costa, happened to be a partner. It was not a matter of common ignorance that proceedings were being taken in Liverpool about this very time with reference to ships as to which the United States Government complained that they should not be



allowed to leave the port of Liverpool. Is it probable or credible then that Mr. Miller would make a communication, which necessarily would be a communication of a confidential and secret character, to a person like Da Costa, with whom he had no connexion, and as to whom he had no motive for making such a communication?

ARGUMENT.

2nd Day.

Then, my Lords, look at what the communication is said to have been. It is unfortunately but too clear upon the face of it, that it is a statement made actually by repeating almost the very words of one of the counts of the information. That statement is this, that Mr. Miller said, I, in conjunction with Messrs. Fawcett, Preston, and Company, are building the "Alexandra" for Messrs. Fraser, Trenholm, and Company, who are the agents for the Confederate States of South America. It is a statement, I say, made clearly and distinctly to prove one of the counts of the information, and it is a statement which in common life it is utterly impossible to believe that Mr. Miller made; but it does not stop there. The witness says he made it three times; then he enlarges the statement he has made to "several times." Can any man conceive that a statement of that sort, a statement which you cannot believe in probability was made once, should have been made several times upon one occasion, and repeated upon others? The thing is incredible. But all I have to say is, that it was for the jury to say whether with those observations to which I say the evidence of Da Costa is open, that evidence ought to be credited and received, and whether, supposing that a declaration of Mr. Miller would have an effect upon the case, they were to believe that that declaration ever was made.

Now, my Lords, I have submitted to your Lordships the view of the evidence which I should desire to present in opposition to that part of the rule which asserts that the verdict was against the evidence, or against the weight of evidence. I say it was for the Crown, in a case of a forfeiture, or a case of an offence, to prove their case with reasonable certainty; I do not say to demonstration; but I say this was the kind of evidence which they presented to the jury, and I say that if the jury had found differently, I should have had very good ground to complain of and find fault with the finding of the jury. Upon that point very different opinions may be entertained; but at all events it was for the jury to say whether upon that evidence they found that the intent, with respect to the employment of the ship, which would bring it within the section, was made out. And if they arrived at the conclusion that that intent was not made out, I say that they were warranted—clearly and distinctly warranted—in arriving at that conclusion.

That brings me to what I propose to myself as the third and remaining point with which I have to trouble your Lordships, and it is a point which will lie within a very narrow compass. Having submitted to your Lordships the view of what I apprehend to be the law upon a case of this kind, and having submitted

ARGUMENT.  
 2nd Day.

the view of the evidence which we represent, I come to the direction which was understood to come from the Lord Chief Baron to the jury, and to apply that direction to the law and the facts I have mentioned. Now, my Lords, I have had the advantage of perusing the short-hand writer's notes, in two different editions, I may say, of the charge of the learned Lord Chief Baron, and I will submit to your Lordships the propositions which I understand to be deducible from that charge. And, if I am right with respect to those propositions, in saying that they are fairly deducible from the charge, I think your Lordships will be of opinion that those propositions would carry to the mind of the jury a sufficient and reasonably proper explanation of the law on the subject as applicable to the case before them.

But, my Lords, I cannot help quoting, as an observation upon that question, what I see fell from a learned Judge of another Court, Mr. Justice Crompton, with reference to criticisms such as are sometimes made upon the charge of a learned Judge upon an occasion of this kind. It was in the case of the Queen against Russell, which was an application for a new trial on an indictment for obstructing navigation, on the ground of misdirection, which is reported in the 23d volume of the new series of the Law Journal, (it is an appeal from a magistrate's Court), at page 173. "No doubt, any expression thrown in by a Judge may, strictly speaking, have an effect on the verdict; but the real question is, as said by my brother Coleridge, whether the direction was practically correct. If it was, we should not disturb the verdict on that ground; I am satisfied that the learned Judge did not use the words in the sense complained of; my only doubt has been whether the jury may not have misunderstood him. If they had done so, I should imagine he would have interposed when the verdict was returned, and directed it to be entered for the Crown. It is dangerous to pick out particular expressions from a Judge's summing up, and to criticize them verbally when he is substantially correct in the direction he gives to the jury." My Lords, I think that is a fair canon of interpretation to apply to the charge of a learned Judge. It is quite obvious that no charge to a jury could practically be sustained if it were not looked at and judged from the point of view there laid down.

Now, my Lords, I come to the propositions which I deduce from the words of the learned Lord Chief Baron in this case, and I will refer to the parts of the charge from which I deduce them. They are four in number, though they go to make up one general view of the case. My Lords, in the first place, I understand the Lord Chief Baron to have laid down this to the jury, that to build a ship, as distinguished from equipping, fitting out, furnishing, and arming her, is not an offence within the Act of Parliament, even although the ship so built might be easily convertible into a ship of war.

*Lord Chief Baron.*—For a power not actually engaged in war

a ship may be built and even completely armed; the statute would not prevent it at all.

*Sir Hugh Cairns.*—No doubt, my Lord, that would be upon another point, as an article of merchandise, of course; but I was speaking now irrespectively of the question whether it was intended to sell a ship as an article of merchandise or not; but I understand the charge of the Lord Chief Baron to go to this, that the building of a ship is distinct from equipping, fitting out, furnishing, and arming, though the ship might be easily converted into a ship of war.

*Lord Chief Baron.*—It seems to me to be as plain as possible, that you must give some effect to the omission of the word "build," otherwise if it was intended that nothing of that sort should be done, it would have been the easiest thing in the world to say "you shall not build."

*Sir Hugh Cairns.*—Quite so, my Lord.

*Lord Chief Baron.*—I think it is important, in order to get at what was meant not to be done, to find out what it is that you are allowed to do. If I recollect rightly, in some of the matters that you have alluded to, in the correspondence which led to the adoption of these rules of Washington's, there are some words as to the course which it was desirable to take.

*Sir Hugh Cairns.*—He says, "We are a shipbuilding nation;" we must take care not to interfere with that.

*Lord Chief Baron.*—Just so; they would not like to have the entire craft of shipbuilding abolished.

*Sir Hugh Cairns.*—The second proposition which, if I understand the charge aright, I conceive to be laid down, is this, that the "Alexandra" clearly was not armed, and that it was for the jury to say whether she was equipped, fitted out, or furnished, or intended so be, within Her Majesty's dominions. The third proposition which is deducible from his Lordship's charge—I do not mean to say that these propositions were laid down, it is not the habit to lay them down distinctly—was this—

*Mr. Baron Channell.*—You say, "equipped, furnished, or fitted out within Her Majesty's dominions."

*Sir Hugh Cairns.*—Yes, my Lord.

*Mr. Baron Bramwell.*—Or intended so to be.

*Sir Hugh Cairns.*—Or intended so to be. The third proposition which I collect is this, that the equipment, furnishing, or fitting out must be of a warlike character. And the fourth proposition I understand to be this (and I will in a moment compare it with what fell from my Lord this morning), that it was for the jury to say whether they considered that there was any intention of employing the ship to cruize and commit hostilities at all.

Now, my Lords, I ask for a moment your Lordships' attention to the fourth of these propositions before I come to the charge itself; because I must say, that it seemed to me that if any person could have had any just ground of complaint with regard to that part of the charge, it would have been, not the

ARGUMENT.

2nd Day.

ARGUMENT.  
—  
2nd Day.  
—

Crown, but the claimants; because, if I might take leave to say so, with very great respect to my Lord, what I should observe upon that, is this—that perhaps that proposition has in it a breadth which is not necessary, and as to which the claimants might say that it was putting the case in an unfavourable way for them. For example, on behalf of the claimants I take leave to think I might say, Do not leave it to the jury—or that your Lordship should not leave it to the jury—to say whether there was an intent to employ the ship to cruize and commit hostilities at all,—I might say, leave it to the jury in a more limited form—leave it to the jury to say whether there was an intent to employ her to cruize and commit hostilities on the part of one belligerent against the other belligerent. That is a much more limited proposition. But my Lord left the larger one to the jury, as I understand it. And therefore I say, that if any one can complain of that it is the claimants, that is the defendants, and not the Crown, because if the jury found against the Crown upon the larger proposition, *a multo fortiori* they would have found against the Crown upon the smaller proposition. It seems to me therefore that, entirely owing to what my Lord said this morning, that he did not think it necessary to put to the jury about the particular service upon which the vessel was to be employed, if it is the case, as I think I shall show that it is, that though he left the question to the jury whether she was to be employed to cruize and commit hostilities at all, he left out the other question involved in it, whether she was to be employed in the service of A. against B.

Now, I will give an example of the passages which seem to bear out the propositions which I have submitted to your Lordships as the effect of the charge.

*Lord Chief Baron.*—My intention was to assume that she was intended by those who were intending ultimately to employ her for the Confederate Government. I will read to you a part of what I said, at page 232. “I do not know what conclusion you “ would come to as to what service she was intended for. If it “ became a matter of importance to decide that, it would be a “ question for you to decide whether it amounted to more than “ a strong suspicion, or whether it was so made out to your “ entire satisfaction as to justify a verdict in that direction.”

*Sir Hugh Cairns.*—No doubt, my Lord; nothing could be more distinct. Your Lordship did not put it to the jury for what particular service she was intended; but if your Lordship will bear with me for a moment I will come to that passage by and bye.

*Lord Chief Baron.*—Allow me to finish the sentence. “But, “ gentlemen, I do not propose to put that to you, nor do I think “ it worth while to follow the learned Attorney General through “ the whitewashing of Clarence Randolph Yonge, because after “ all, what he proved seems to me to have the least possible connexion with or effect upon the real question in this case, “ which I take to be this—Was the vessel built, or was it merely

" in course of building? Now, gentlemen, I present the matter " to you in another point of view, and then comes the question " as to the words employed."

*Sir Hugh Cairns*.—Yes, upon that part, as to the words, I shall have something to say.

*Lord Chief Baron*.—And then comes the allusion to the case cited by the Attorney General then for the first time, not in the opening, but for the purpose, I imagine, of putting the Court in possession of all he meant to rely upon, which case, he having cited, I adopted. I am not sure that, if the question were to be argued here, I should entirely concur in that; it would require a good deal of consideration, and, perhaps, some little reflection, but I adopted it, and stated to the jury that I considered myself upon that occasion bound by that authority, and left it to them as part of the law of the case. Then I go on, " I do not mean to say that it is absolutely necessary (and I " think that the learned Attorney General is right in that), it " is not perhaps necessary that the vessel should be armed at all " points; though it may be that the case cited from 6th Peters' " Reports by the learned Attorney General, somewhat late in the " day, is a case where the jury found that the vessel was actually " fitted out." It was admitted that she was not armed at all. " They found so most properly, for she actually sailed away with " the captain, who afterwards turned her into a privateer, and " she went away, in a great measure, fitted. The jury found " that she was fitted," and it was quite clear that she was not armed. " The question is, whether you think that this vessel " was fitted. Armed, she certainly was not, but was there an " intention that she should be furnished, fitted, or equipped at " Liverpool?" (leaving "armed" quite out of the question). " Because, gentlemen, I must say," (and here comes that, "if"), " it seems to me that in respect of the 'Alabama,' if she " sailed away from Liverpool without any arms at all, " merely a ship in ballast, unfurnished, unequipped, unprepared, " and her arms were put in at Terceira, not a port in Her " Majesty's dominions, the Foreign Enlistment Act is no more " violated by that than by any other indifferent matter that " might happen about a boat of any kind whatever." I certainly meant to assume that it was not necessary for the jury to come to any conclusion with respect to the use that was to be made of the vessel by anybody, because if she was not in a condition fitted, furnished, and equipped, so as to come within that which a subject of this country is not allowed to do—if she was never intended to be put in that condition, then it did not signify at all what was the service for which she was ultimately intended. And I thought that the use that was to be made of the words " attempt," "endeavour," and so on, is this, that provided there was no intention of doing an act that was forbidden, what was attempted to be done would not be a violation of the Act.

*Sir Hugh Cairns*.—Of course not, my Lord. There is no doubt that in the passage which your Lordship has read the

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

jury were told that it was not put to them, and that it was not necessary for them to consider what was the particular service that she was intended for. I shall presently call your attention to what was said in the latter part of the charge. But allow me first to refer, in support of the first of the propositions which I said were to be collected from this charge, to the bottom of page 229 and the top of 230. After referring to the authorities—to Justice Story and the Commentaries of Chancellor Kent, my Lord says, "These, gentlemen, are authorities which show that where two belligerents are carrying on war, the subject of a neutral power may supply to either, without any breach of international law, and certainly without any breach of the Foreign Enlistment Act (and it does not say a word about it) all the munitions of war, gunpowder, every description of firearms, cannon, every kind of weapon, in short, whatever can be used in war for the destruction of human beings who are contending together in this way. Well, gentleman, why should ships be an exception? In my opinion, in point of law, they are not. Presently I shall have to put to you the question of fact about the 'Alexandra,' which you will decide. The Foreign Enlistment Act it is now necessary for me to advert to, in order to tell you what is the construction which I put on the seventh section, which alone we have to do with on the present occasion." Then his Lordship reads the title of the Act, and the preamble. Up to that point I submit to your Lordships that it is perfectly clear that where his Lordship speaks of ships he could not have meant—it would be absurd to suppose that he meant—furnishing, fitting, and arming; he speaks of ships being built as distinguished from whatever might be meant by equipping, furnishing, fitting out, and arming. It is made still more clear at the top of page 231, where, after reading the words of the Act, and those words especially "equipping," "fitting out," and "arming," his Lordship says, "Now, with respect to the question of building, it is certainly remarkable that there is not a word said about it. It is not said that you may not build vessels for the belligerent power. There is nothing suggested of the kind, and clearly by the common law, and by the passages I have read to you, surely if from Birmingham either State may get any quantity of destructive instruments of war, and if from the various parts of the kingdom where gunpowder is made they can obtain any quantity of that destructive material, why should they not get ships? Why should ships alone be themselves contraband," that is to say, forbidden by the statute. It is perfectly apparent, and no person can contend for a moment that the jury misunderstood this matter; that where my Lord spoke of the building of ships as not being prohibited, he meant to refer to the building of ships as distinguished from what might be meant by those other words, "equip, &c."

Now as to the second point; the view which was presented by

my Lord to the jury about the "Alexandra," and her condition with reference to the 7th section, the passage my Lord has read is the chief one which I meant to rely upon for that purpose. I mean that passage which begins below the middle of page 232, but I cannot help thinking, more especially when I find that the two reports do not agree, that there is a slight inaccuracy in one of the reports in part of that passage, which may affect the whole, as to which I will take leave to make my suggestion at the proper time. My Lord says, "Now, gentlemen, I present the matter to you in another point of view. The offence against which the information is directed, is the 'equipping, furnishing, fitting out, 'or arming.' Gentlemen, I have looked, so that I might not go wrong, (as we have the advantage of having it here) at Webster's American Dictionary, a work of the greatest learning, research, and ability. No one can complain that I refer to that. It appears there that to 'equip' is to furnish with arms. In the case of a ship especially it is to furnish and complete with arms. That is what is meant by 'equipping.' 'Furnish' is given in every dictionary as the same thing as 'equip.' 'To fit out' is 'to furnish and supply,' as to fit out a privateer. And I own that my opinion is, that 'equip, 'furnish, 'fit out, or 'arm,' all mean precisely the same thing."

Now I stop there for a moment. There cannot be the slightest doubt that in one sense those four words do mean the same thing, that is, no person could doubt for a moment that to equip would include all equipments, and that equipment would be a *nomen generale*. It would be absurd to say that all kinds were not all included in the term equipment. And certainly with respect to the term "arm," it is impossible to say that that would not be included in the other terms "equip," "fit out," or "furnish," if it were necessary. There can be no doubt that each of the three words first mentioned would include and comprehend in their extent the fourth term to "arm." Then it concludes, "I don't mean to say that it is absolutely necessary (and I think that the learned Attorney General is right in that) it is not, perhaps, necessary that the vessel should be armed at all points." Now, with regard to that, I cannot help thinking that it is not quite an accurate report by the short-hand writer, because in our report it is a little different. This is printed from our short-hand writer's notes, without any correction. We do not pledge ourselves to one more than the other. At page 245 in the small copy, three or four lines lower down, after speaking of the equipping, fitting out, and furnishing, the learned Lord Chief Baron is made to say, "I do not mean to say that it is absolutely necessary, (and I think that the learned Attorney General is right in that)." That is one sentence. "It is not, perhaps, necessary that the vessel should be armed at all points, although it may be that the case cited from 6th Peter's Reports by the learned Attorney General somewhat late in the day is a case where the jury found that the vessel was actually fitted out." Now, inasmuch as we find immediately afterwards that the

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

learned Lord Chief Baron takes distinct notice that the "Alexandra" was not armed at all, but that still there was a question to be submitted to the jury notwithstanding that, it seems to me perfectly obvious that just a word or two has dropped out from this sentence.

*Mr. Attorney General.*—Oh!

*Sir Hugh Cairns.*—My friend is very fond of interrupting by a sneer or a laugh, but I venture to think that it would be better he should hear what I have to say upon the point, and reply in a more decorous form at the proper time. My Lords, I venture to think that it is a fair and just conclusion from the whole of this passage, taking notice, as we do, that the Lord Chief Baron pointed distinctly the attention of the jury to this, that the "Alexandra" was not armed at all, but that yet the question was for them whether there was or was not an intention of equipping, fitting out, and furnishing; I say it is to my mind reasonably clear that he must have said this,—I don't mean to say that it is absolutely necessary she should be armed, and it is not necessary that she should be armed at all points. Because otherwise there would have been an end of the case. There would have been nothing to leave to the jury. If my Lord had meant to say, It is not necessary that she "should be armed at all points;" implying that it is necessary she should be armed to a certain extent; and if the moment afterwards he went on to tell the jury it is admitted that she was not armed at all, but it is for you to say whether there was an infringement of any of those other words which occur in the Act of Parliament.

*Mr. Baron Channell.*—What did the Lord Chief Baron treat as the finding of the jury in that American case which was referred to?

*Sir Hugh Cairns.*—There were no arms; the ship was not armed in the Quincy case. She had equipments and fittings out of a warlike character, but not arms.

*Mr. Baron Channell.*—You read the Lord Chief Baron's observations as amounting to this:—"If the jury find the vessel "was actually fitted out," and then adding the words "though "not armed at all points."

*Sir Hugh Cairns.*—She was fitted out of course with the fittings which the report of that particular case shows were on board.

*Mr. Baron Channell.*—If the Lord Chief Baron says, "It is "not necessary that the vessel should be armed at all points," he is speaking of some amount of armament; and the case which was cited somewhat late in the day is a case where the jury found that the vessel was actually fitted out, though not armed at all points.

*Sir Hugh Cairns.*—Though not armed or armed at all points, is how I understood the Lord Chief Baron to put it. I apprehend there is an alternative. In his Lordship's allusion to that case he first presented to the jury what might be his own view of this verbiage, "equipping," "fitting out," &c., but which



it was not necessary to lay down to the jury as the law. But, then, says my Lord, I do not mean to lay that down to you, nor do I mean to say that it is necessary she should be armed, or armed at all points; neither one nor the other. Then what is the question that I should leave? His Lordship makes it clear, because he goes on to say,—“The question is, whether you think “that this vessel was fitted; armed she certainly was not.” But if his Lordship had meant to say, All I can tell you is that she need not be armed at all points, but must be armed somewhat, there would have been nothing to leave to the jury at all. Whereas my Lord goes on to say, “The question is whether you “think she was fitted; armed she certainly was not; but was “there an intention that she should be furnished, equipped, or “fitted out at Liverpool?” That clearly shows that he meant to put it in contrast with the arming, if it was necessary to separate the one from the other.

*Mr. Baron Bramwell.*—It strikes me that the other side would not agree to what you say, that there was an end of the case if arming were necessary. Because, supposing it was necessary to arm; if it were intended to arm partly at Liverpool, it would be within the Act of Parliament.

*Sir Hugh Cairns.*—But the Lord Chief Baron does not say that.

*Mr. Baron Bramwell.*—I understood you to say that if the Lord Chief Baron had laid down that more or less of arming was necessary there was an end of the case, inasmuch as there was no actual arming at all. I say that that would probably not be agreed to, for this reason, that if there was an intention to arm, and they were preparing the ship to receive arms, that would be enough.

*Sir Hugh Cairns.*—But your Lordships should be good enough to bear in mind the statement of the Attorney General in reply. He had virtually,—indeed, I may say, literally *in verbis*,—conceded the question of any intention to arm.

*Mr. Baron Bramwell.*—Did he do so?

*Sir Hugh Cairns.*—Oh yes, my Lord; that was perfectly understood.

*Mr. Baron Bramwell.*—I was not aware of that being the case.

*Mr. Attorney General.*—I distinctly differ from my learned friend.

*Sir Hugh Cairns.*—I expect that my learned friend will “distinctly differ” with everything he has heard me say from beginning to end.

*Lord Chief Baron.*—Is there anything in the whole information that charges arming at all, or anything about it?

*The Queen's Advocate.*—No, my Lord; nothing at all.

*Sir Hugh Cairns.*—No, my Lord, there is nothing about arming or about an intention to arm.

*Mr. Baron Bramwell.*—As I understand, you say that my Lord told the jury that it was not necessary that the vessel

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

should be armed, and that had he said otherwise, or been of a different opinion, that it was necessary that she should be armed, that that would have put an end to the case. Now I do not think it would, because, although the statement in the information is "furnish," "fit out," and "equip," and there is nothing about arming, yet if furnishing, fitting out, and equipping may take place where there is a partial arming, then although no actual arming had taken place, yet if they were attempting to do that, the offence would be in the intention.

*Sir Hugh Cairns.*—The Act of Parliament does not say "intend," it says "an attempt to arm,"—that is an act—and there is no such act alleged in the information. There is no attempt to arm alleged in any part of the information, from the beginning to the end. I do not believe that the word "arm" occurs in the information in any count.

*Mr. Baron Bramwell.*—No, it does not.

*Sir Hugh Cairns.*—I believe we are all agreed about that, therefore I say, my Lords, that the Lord Chief Baron leaving to the jury this question, "Was there an intention that she should be furnished, or fitted out, or equipped at Liverpool?" left exactly the question which under the Act of Parliament ought, in our view of the case, to be left to them, and that although my Lord did say that in his opinion there would be ground to argue that those four words meant to signify the same idea, he did not so put it to the jury. He receded, for the purpose of the question he was going to put to the jury, from any view of the law of that kind, and adopted the view indicated in the American case cited by the Attorney General. He made it perfectly clear beyond the wretched criticism (which probably as we heard it on the motion for the rule will be repeated here), that the jury believed, or imagined that the Lord Chief Baron was saying, "If you are of opinion that there were no arms on board, there is an end of the case, and you must find a verdict for the claimant and not for the Crown." Now as to the character of the equipment which must be on board, to which, throughout the whole of his charge, his Lordship must have been taken to have been pointing, your Lordships will find it very clearly laid down, and it is not necessary that the learned Judge should repeat in every sentence what he has before stated. At the bottom of page 230, your Lordships will find this: "Now, gentlemen, the question that I shall propose to you is this, whether you think that this vessel was merely in the course of building for the purpose of being delivered in pursuance of a contract, which I own I think was perfectly lawful; or whether there was any intention that in the port of Liverpool or any other English port (and there is certainly no evidence of any other) the vessel should be equipped, fitted out, and furnished or armed for the purpose of aggression? That is the question." Pointing clearly to the character and object of the equipping, furnishing, fitting out, or arming, as the case might be. My Lords, still further upon that point you will find at page

233, what will at the same time support what I call my first proposition, and also the fourth. Your Lordships will find about 10 lines from the bottom of page 233, after speaking of the evidence of Captain Inglefield, my Lord says: "In short, what he makes out is, that she might have been built for a yacht, or might have been built as a vessel capable of being convertible into a war vessel. But the question is, was there any intention that in the port of Liverpool, or in any other port, she should be, in the language of the Act of Parliament, either equipped, furnished, fitted out, or armed with the intention of taking part in any contest?" Now, my Lords, I say that that is the larger proposition which I took leave to submit, we on the part of the claimants might have demurred to, but which the Crown certainly cannot object to. It is quite true that my Lord, as he said just now, told the jury that he did not mean to trouble them with the question of what particular service she might be intended for, but here is a question which includes the other, a much larger and much more intelligible question which was left to the jury. Is it your opinion that in the language of the Act of Parliament, she was intended to be equipped, furnished, fitted out, or armed with the intention of taking part in any contest?" Well if she was not armed, equipped, furnished, or fitted out with the intention of taking part in any contest, *a multo fortiori* she could not have those things done to her with the intention of being employed in the service of the Confederates to cruise and commit hostilities against the United States of America. It seems to me beyond the possibility of controversy that this larger proposition to which I say we might have objected includes in it the minor propositions which the Crown complains was not found in the charge of the Chief Baron.

Now, my Lords, I therefore submit to your Lordships that the charge looked at in this way will be found in substance to have directed the attention of the jury to everything which ought to have been laid before them as matter of law, and to everything which ought to have been put to them as the issue of fact to be decided between the parties. And, my Lords, I feel satisfied that both according to your Lordships' practice in all actions which are tried in this Court, but I might say more especially according to the immemorial practice in actions which are of a penal character, or actions involving a forfeiture, if your Lordships find, that this case has been tried in a manner which has produced a result satisfactory to your Lordships' mind on the law and on the evidence, your Lordships will not enter into any minute criticism upon the words of the charge, but well rest satisfied with the manner in which the verdict was given. I submit with confidence that on the evidence which I have taken the liberty of commenting on, it is utterly impossible to say that a jury was not warranted, and thoroughly well warranted, in coming on the facts to the conclusion that they came to, and that evidence presented on the part of the Crown, was evidence that could not

ARGUMENT.

2nd Day.

ARGUMENT. support the case which the Crown alleged and which the Crown attempted to prove.

2nd Day.

Then I say, on the construction of the Act of Parliament, the evidence as to the condition of the ship the "Alexandra," and the evidence as to intention was evidence which shows clearly and distinctly that the "Alexandra" was neither equipped, furnished, nor fitted out, nor armed, nor was there any intention to furnish, to equip, fit out, or arm her, or any attempt to do any one of these things, within the port of Liverpool, or within any part of Her Majesty's dominions. And I say let any person read the reply of the Attorney General in this case, and it is utterly impossible to do otherwise than arrive at the conclusion that the Crown at that time thought they were not entitled to a verdict, and if your Lordships are of that opinion, in substance the justice of the case has been arrived at. And certainly, my Lords, I, on behalf of my clients, however interesting it may be to have points of law decided upon an Act which has not been made the subject of discussion up to the present day, do trust that your Lordships will not have those points discussed at the expense of my clients. I venture to say, and with confidence, that the Crown is bringing forward a case which is without precedent during the 70 years which have elapsed since the statute was made on this subject across the Atlantic,—which is without precedent during the 40 years in which we have had a similar Act of Parliament in this country. I say it is impossible to suppose that if the law were as they allege it to be, cases would not have occurred again and again where seizures and forfeitures would have been made under the penalties of this Act. I say the case they are bringing forward is against the history of legislation on this subject; it is against the true and sound construction of the Act of Parliament on the subject; it is against the declarations which have been made by every one who has had the right to control the movements of the Crown, or to direct or advise the movements of the Crown, in putting this Act into execution from the time when the Act first attracted public attention. And I trust that your Lordships will think that the litigation we have had in this case is enough; that full, perfect, and complete justice has been done between the Crown and these claimants on a statute of this kind; and that your Lordships will be of opinion that there should be no further litigation in this case.

*Mr. Baron Channell.*—Will you let me see for one moment the smaller copy of the short-hand writer's notes.

*Mr. Karslake.*—My Lords, it will be convenient for me, in showing cause against this rule, to follow, to some extent, the course which my learned friend, Sir Hugh Cairns, has adopted, and to consider in the first place, what is the construction to be put upon the statute upon which this information has been

filed; what the evidence has been in this case, and what the charge of the learned Lord Chief Baron was to the jury, which is now complained of. I cannot help thinking, that as far as the second point goes, namely, what the evidence was in this case, and what was the effect of it, that the motion of the Attorney General was rather directed to this; not that the verdict was against evidence, as the case was left to the jury, and according to the Lord Chief Baron's view of the law; but assuming his Lordship's ruling to be wrong, that the evidence would have supported the verdict, in the event of the ruling being as my learned friend, the Attorney General, wished it to be. If that is so, it seems not necessary to argue at any length the question, whether the verdict was against evidence or not. The question therefore, resolves itself into this, whether there had been a misdirection on the part of the learned Chief Baron.

ARGUMENT.

2nd Day.

*Mr. Baron Bramwell.*—I assume that all the Attorney General would say would be this, that assuming my Lord left the case to the jury, as the Crown says it ought to have been left, namely, that any equipping or fitting out would be within the Act of Parliament, although it was not a warlike equipping; that then the verdict was against the evidence. I suppose that to be what the Attorney General would say.

*Mr. Karlake.*—Yes, my Lord; so I rather assume from having had the advantage of hearing a great portion of his address to the Court when the rule was moved for. I apprehend that that is not a verdict against evidence. I did not understand the learned Attorney General to say that, assuming the Lord Chief Baron laid down the law, as we say he did, there was not ample evidence to support the view of the law he laid down; but I understand him to say, he will first of all contend that the Lord Chief Baron was wrong in his view of the law, and then, assuming the view presented of the law to be correct, that the evidence supported that view.

*Mr. Attorney General.*—It must not of course be forgotten that I took a certain view of what the Lord Chief Baron laid down which may possibly turn out not to be correct, and supposing that view is not correct, then I adhere to my motion on the ground of its being against evidence.

*Mr. Karlake.*—Then, my Lords, it may be necessary to go a little more at length into the evidence of the case to show that it would warrant the verdict given. At all events, upon that part of the case, we have the information that my friend in some view or other considers that the verdict was not warranted by the evidence given in the cause, and upon that ground he asks for a new trial, that is, on the ground that the verdict was against evidence; and he also states that there has been misdirection on the part of the learned Judge, and he is allowed to adopt a course which is not allowed to be adopted generally by other litigants in this Court, namely, to state simply that there has been misdirection, and by and by to contend that there has been such misdirection without at present at all

ARGUMENT.  
 2nd Day.

informing his opponents what the misdirection is. Therefore we are left to consider what is the law, and whether his Lordship was right in his view of the law, without any assistance from the terms of the rule as to what my friend says the Lord Chief Baron directed, and what he ought to have directed under the circumstances of the case. My Lord Chief Baron has said that with the view of construing this Act of Parliament, and especially the 7th section, it is extremely important to see what might be done before this statute was passed. After the full history of that which led to the passing of this statute, which has been gone into at such length by my learned friend Sir Hugh Cairns, I will trouble you very little indeed upon what took place in America, or upon what took place in England, before this statute was passed. But, my Lords, I think that I may call attention to an authority which is earlier even than the authorities of 1793, to which my learned friend called attention, (and which will be found in Fortescue's Reports, at page 338, curiously enough under a discussion by the Judges as to the Precedence, &c. of the Judges :) the *dictum* as to what had been the advice given by the Judges in the House of Lords, as to the right of building ships of war for foreigners in this country; and it appears to me extremely important for the purpose of ascertaining what was declared as long ago as 1713, and again in 1721, to be the opinion of the Judges as to the right of fitting out for foreign nations ships of war in this country. At page 388 your Lordships will find the following passage: "In Michaelmas vacation 1721, the Judges were ordered to attend the House of Lords, concerning the building of ships of force for foreigners, and the question the Lords asked the Judges was, whether, by law, His Majesty has a power to prohibit the building of ships of war or of great force for foreigners, in any of His Majesty's dominions? And the Judges were all of opinion (except Baron Montague, Chief Justice Pratt delivered the opinion) that the king had no power to prohibit the same, and declared that Montague said he had formed no opinion thereon. This question was asked on occasion of ships built and sold to the Czar, being complained of by the Minister of Sweden; Trevor and Parker gave the same opinion in 1713." Therefore there is the opinion given by the Judges that the Crown could not interfere to prevent ships of force being fitted out with warlike equipments, in this country, for foreigners, at all events in the years 1713 and 1721.

*Mr. Baron Bramwell.*—What are we to understand by that, that the Judges thought that the expedition might be fitted out to invade the territory of the Czar?

*Mr. Karstake.* That His Majesty had no right to stop the sailing of those warlike ships, for the purpose of being engaged in war with foreign belligerents. That was the opinion of the Judges upon that point.

*Mr. Baron Bramwell.*—There was no process to stop them,

there was no process by which the Crown could have stopped them from proceeding, was there?

ARGUMENT.

2nd Day.

*Mr. Karlake.*—That question was, I suppose, submitted to the Judges at the same time. The question was, whether the subjects of this country could be prevented from selling warlike ships to foreign nations at war.

*Lord Chief Baron.*—I dare say you are aware that the last time the Judges were assembled for the purpose of having a question put to them in that general way, without any argument on either side, one of the most eminent Judges that ever occupied a seat on the Bench of English Judicature, refused to give any opinion at all—I mean Mr. Justice Maule; and he said that unless the matter was argued before him, so that he might know what was to be said on the one side or the other, he should decline giving any opinion. I apprehend that it is very unlikely that a question of that sort ever was argued.

*Mr. Karlake.*—Very possibly.

*Mr. Baron Bramwell.*—We are summoned by our writs to advise the House.

*Mr. Karlake.*—I believe at the time it was the common practice for the Judges to give information to the Crown when asked.

*Lord Chief Baron.*—Not only in the House of Lords, but it was not an uncommon thing you will find for the Judges to be assembled for the purpose of giving an extra-judicial opinion. They were assembled once upon the question of the right of the Sovereign to control the whole of the Royal Family, and as to giving him during the lifetime of the Prince of Wales a control over the Prince of Wales. He was considered to be the father of the Royal Family. The Judges, certainly not in the House of Lords, but at Serjeants Inn, were assembled, and gave an opinion, and they have been in the habit of doing it upon other matters of State.

*Mr. Karlake.*—My Lords, I cited that passage as showing the opinion of the Judges, and as a declaration therefore as to what was considered to be the law at that time, at a date prior to that of the first authority which was cited by Sir Hugh Cairns, namely, the resolutions or rules which were come to in 1793, and to show that before that time the question had been considered here, and that that considered opinion had been given by Her Majesty's Judges upon the subject. My Lords, for the first time, in the year 1794, the American Government passed an Act of Congress for the purpose of making certain provisions as regards the equipment of ships, and I am not going to trouble your Lordships with the history of those resolutions that were come to and the rules that were laid down, because your Lordships have the rules before you and can see what, according to the view entertained by eminent men at that time, was considered to be the extent of the prohibition, and what were the rights of neutrals in supplying ships and equipments to belligerents. Now, my Lord, it was not thought worth while in England to

ARGUMENT.

2nd Day.

interfere in any way by statute until the year when this Act was passed, at least so far as ships were concerned, and although this is now called the Foreign Enlistment Act, certainly so far as ships, which are mentioned in the 7th section, are concerned, it is a most inappropriate title, because there is no question that it has retained the name of the Foreign Enlistment Act from the circumstance that by it a slight alteration of existing law as regards subjects entering the service of foreign powers, was then made, and that these sections as to ships found their way into that Act of Parliament under circumstances which have been referred to by my learned friend Sir Hugh Cairns. Now, my Lords, what were those circumstances? Because it is not immaterial to see what gave rise to the necessity for municipal legislation on this subject. Undoubtedly, when one looks at the debate which has been referred to, it will be found that by far the most important consideration at that time was the amendment of the law as to foreign enlistment. But then it was thought expedient also to put a stop to that practice which was existing in this country at the time when this Act was passed, namely, of expeditions being organized by the subjects of this country, who sailed from its shores, in the ships fitted out here, for the purpose of taking part with one or other of the belligerents. It was under those circumstances that when the Foreign Enlistment Act of 1819 was passed, these new sections providing against the equipment of vessels were included in it; and, my Lords, I think that anybody who reads the preamble of the Act, without going further, without looking at the section which has been so much commented upon, would say that beyond all doubt, so far as the preamble discloses the object of the Act, the main purpose was to prevent His Majesty's subjects from engaging in war on their own account; because we find that the first part of the preamble relates to the enlisting by any persons of Her Majesty's subjects; and the second part of the preamble clearly refers, or appears to refer, to the arming of vessels by Her Majesty's subjects for the purpose themselves of carrying on warlike operations. It says: "Whereas the enlistment" (that is, as I understand, by any one) "or engagement of His Majesty's subjects to serve in war, in foreign service, without His Majesty's licence, and the fitting out and equipping and arming of vessels by His Majesty's subjects without His Majesty's licence, for warlike operations in or against the dominions or territories of any foreign prince, state, potentate, or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate, or persons as aforesaid or their subjects, may be prejudicial to and tend to endanger the peace and welfare of this kingdom."

Now, my Lords, so far as the former Foreign Enlistment Acts were concerned, namely, the Act of the 29th of George the 2nd, and the 5th George the 3rd, and so far as this Act in dealing



with enlistment is concerned, the main purpose is to prohibit the subjects of the Crown from taking service under foreign powers. The Acts are directed to the purposes of keeping those subjects within their own allegiance, and of preventing them giving up that allegiance by entering into foreign armies. But when we come to the sections relating to the equipment of vessels, I think you will find that they have been framed with reference to those rules of the law of nations which have been laid down, and which have been recognised in this country, and which were perfectly well known as being the law of nations existing at the time the Act passed. Let me call your Lordships attention to some considerations as to what was permitted in the year 1819 at the time of this Act of Parliament passing, and without enumerating all the things that might be done by a shipbuilder in this country, it is sufficient to say that my friends who argue on the other side, will not deny that it was quite open to a shipbuilder in this country, in the year 1819, and it is now open to him to sell a vessel fully equipped and armed, under a contract and as a commercial transaction, to a belligerent, that ship sailing perfectly complete and armed from these shores, and I say, that that was a case which might have occurred, and which, probably, did occur before the time that this Act passed, and which advisedly has not been interfered with by the Act now under your Lordship's consideration. Moreover there were many other cases which my learned friend Sir Hugh Cairns has adverted to in which shipbuilders in this country or any other country, according to the law as declared by Washington, had a perfect right to enter into commercial transactions as regards ships, although beyond all doubt by so entering into those commercial transactions they might strengthen the hands of the belligerents, and might cause a considerable degree of irritation in the minds of one or the other of the powers engaged in war. But that was not intended to be prohibited by this statute, and that which did lead to the passing of the statute was, beyond all doubt, this: that ships of war were, in the year 1819, being fitted out and armed and manned by British subjects, and were sailing from these shores for the purpose of taking part in hostile expeditions against other states. It is under these circumstances that the Act was passed. It would certainly appear that the object of the statute as declared by the preamble, was to prevent His Majesty's subjects from themselves taking part in warlike operations, in vessels fitted out by them and sailing from our ports. Of course I do not contend that the preamble of the statute may not be explained, controlled, or enlarged by the language which one finds in the subsequent sections, and I shall have occasion to consider what the real meaning of the language of those subsequent sections is, but undoubtedly in approaching the consideration of the question, it is absolutely necessary to find out and discover, to some extent at all events, what the law allowed the subjects of a neutral power to do, before we ascertain what the

ARGUMENT.

2nd Day.

ARGUMENT.

2nd Day.

object of this Act was, and what they were to be restrained from doing by the 7th section of the Act. Now, when we come to the 7th section of the Act, we find that words are used there which are not found in the preamble; and I only notice this because Mr. Baron Bramwell seems to have considered that there was some weight to be attached to the word "furnishing," found in the 7th section, which carries it beyond the words "equipping," "fitting out," or "arming," which are also to be found in that section. My Lords, in the American Act, which it was said was the precedent for this Act, you will find that there was no preamble at all to assist in guiding the consideration of what really was intended to be prevented. The words found in the 3rd section of the Act of Congress, which is said to be the precedent for the Act of 1819, the only words are "fit out and arm, or attempt to fit out and arm, or procure," and so on, or "knowingly aid and assist in arming any private ship or vessel of war or privateer, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property," and so on. My Lords, the 7th section is not, therefore, an accurate copy of that section. Now, since this statute has passed, as my friends admit, and as is proved by the American authorities, as well as by the authorities which are found in Kent's and other works which my learned friend has cited, it is still allowable for the subjects of this kingdom to fit out and arm, that is, complete, arm, and equip a vessel, which they may send to a foreign belligerent, asking that foreign belligerent when the ship reaches either his ports or any port out of the United Kingdom, to purchase that vessel, the shipbuilder knowing as a moral certainty at the time he so equips and arms her, and sends her from these shores that the vessel will be purchased, and be used when purchased, for the purpose of carrying on hostilities. However that is not forbidden by this statute. There is another case that might have occurred, and possibly has occurred during the very war now going on, and it would not be a prohibited transaction in any sense; you may send out a vessel, or even deliver a vessel in this country fully armed if the intention of the party receiving be not at once to commence hostilities, but to use the vessel as a model for the purpose of fitting up ships of war in his own country or elsewhere, in order that those ships may be used by the belligerents for the purpose of hostilities, and that is not prohibited by the statute. The Legislature were, no doubt, prohibiting that which might be done at the time to some extent, and the question will be for your Lordships to determine to what extent the undoubted right which the shipbuilder in this country had of supplying as contraband of war, ships of war to foreign belligerents, has been interfered with by the restriction put upon him by this Act. As regards guns, cannon, shot, gunpowder, and other munitions of war there is no prohibition by statute, and those contraband

articles may still be sold and carried, subject to confiscation, to a foreign belligerent. There is a restriction to some extent put on the shipbuilder, and it is a restriction which had not been imposed on other persons carrying on business in other branches of trade, such as in guns, and my learned friend, the Attorney General, asks, as I understand in this case, that instead of your Lordships putting a strict and narrow construction upon this statute, which is a highly penal statute, the widest possible construction shall be put upon it, and that the moment anything is done which, in its nature, tends in any way to render a ship, adaptable even, to the purposes of war, that that ship shall be at once forfeited in consequence of its being equipped within the meaning of this seventh section. My Lords, the question was put by my Lord to the late learned Attorney General, Sir William Atherton, who conducted this case at the trial during his reply to the jury, whether it was or was not an offence at the present moment according to his construction of the Act for a shipbuilder to build a ship which had no equipment of a warlike character of any sort or kind, intending at the time that he built that ship that it should be afterwards used for warlike purposes. But although my Lord pressed the then learned Attorney General to give him his view on the subject, Sir William Atherton expressly refused to do so, and as I understand my friend the Attorney General, he declines to give any opinion on that subject, although the same question was put to him in the course of his motion for this rule. I shall assume however, that, supposing the hull of a vessel, which is capable of being used for warlike purposes, after it has been made complete and has been equipped and fitted out, is sent from this country to a belligerent with the view of its being used for such purposes, but is towed away as a mere hull, inasmuch as there is no prohibition of such an act to be found in this statute, that the act of sending away a vessel in that stage of construction is not unlawful. I say that it is contemplated that there should be something more than a vessel which is to be the subject of forfeiture. It must be a vessel in a particular state and stage of completeness; that is, not simply the hull of a ship, but a vessel furnished, equipped, fitted out, or armed, which is to be the subject of forfeiture under the 7th section. Then, if the law be as I have ventured to state it to your Lordships, that a shipbuilder has still a right, in common with other merchants in this country, to supply the contraband article in which he deals up to a certain point, the question is as to where your Lordships will draw the line, and whether your Lordships are to give to the statute the extremely wide and sweeping interpretation which the Attorney General suggests, or whether the more limited construction which we seek to put upon it is the true construction to be placed upon this Act of Parliament. And when your Lordships consider that question, I venture to say that it is more consistent with the rules of construction adopted by this Court and of other Courts of Law where a new offence is created by Act of Parliament, where a particular branch of commerce which

ARGUMENT.

2nd Day.

"intention of using or employing the said vessel as a privateer, but intended, when he equipped her to go to the West Indies to endeavour to raise funds to prepare her for a cruize,—then the traverser is not guilty." (3.) "If the jury believe that when the 'Bolivar' was equipped at Baltimore and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the traverser is not guilty." Upon the second and third of these instructions so claimed, the decision was given in favour of the defendant.

*Mr. Baron Pigott.*—I suppose that the owner and the equipper was the same person there.

*Mr. Karlake.*—I think he was the same person.

*Mr. Baron Channell.*—The Court below seem to have thought that the intention was not only necessary but absolutely requisite.

*Mr. Karlake.*—No doubt, my Lord. In order that there may no doubt as to what the law, as it was laid down by Sir William Atherton, requires, I would ask your Lordships' attention to the end of the reply, or rather the summing up by Sir William Atherton. Your Lordships will find at page 223 of the small book the following passage: "Gentlemen, that brings us to the great question in the case with which my learned friend next dealt on the evidence. I mean the question of intent, because I have stated, and admitted throughout, that unless you are satisfied upon the evidence produced upon the part of the Crown that there did exist the intent, and I will very much adopt the view put forward by my learned friend as to the kind of person, with reference to the ship, by whom such intent must be entertained to fulfil the description of the intent, I shall come to that in a moment, but unless I satisfy you that the intent that the vessel should be employed by the Confederate States is made out, and an intent existing before the seizure and during the construction of the vessel, I have stated throughout, and I repeat that the information fails."

Therefore my learned friend assumes that which I venture to think he was bound to assume, namely, that it rested upon him to show that there existed an intent on the part of somebody, who was capable of exercising and carrying out such intent, that this vessel should be used by one belligerent against another, and he says that the intent, (which he admits must be a fixed intent) existed on the part of somebody (although he fixed on no person in particular), that the vessel should be used in the service of the Confederate States. At page 238 of the little book Sir William Atherton goes a little more at length into what he considers to be the law as regards the intent. "All that I ask you to do is this: You will take the law, as far as it affects your decision, of course from my Lord, the facts you will judge of on the evidence, no doubt availing yourselves of

“such observations on these facts as the great experience and knowledge of my Lord will suggest to him, or enable him to make available to you. I ask you to give your conclusion in this case on the evidence. If that evidence satisfies you that there did not exist the intent to which I have referred, and I will state at once what I intended to have stated a little earlier that so far I agree with my learned friend, that the intent must be an intent of one or more having at the time the means and opportunity of forwarding or furthering such intent by acts. I agree that anything else called an intent, or rather that which would be called an intent in the mind of any person not of this description, must be treated properly as a mere wish, imagination, or desire. By intent, undoubtedly, the Act means practical intent.” Therefore, that is the construction laid down by my learned friend at that time, and I believe that my learned friend, the Attorney General, now adopts it because in moving for this rule I think I understood him to say—

ARGUMENT.

2nd Day.

*Mr. Attorney General.*—I do not recede from that, and I could not express it better.

*Mr. Karslake.*—I think I understood him to say, what your Lordships will find at page 55,—“That there must be some person party to the business who is capable of having such an intent, and who is it? For example, if a shipbuilder in England builds on speculation on his own account a ship, intending to take it to any port in the world where he can find a market for it, it is obvious that he has not within Her Majesty’s dominions any intent to employ, or any power to employ the ship in the service of any belligerent power; all his intent is to sell the ship to a purchaser somewhere or other; or it may be in some particular place if he can find one there, and nobody but himself has any control over it at the time. Nobody but himself has anything to do with it at the time. Nobody but himself under the circumstances can determine the intent, and as he does not mean to make war in it himself, or does not intend that anyone else shall make war in it, that is not struck at by the statute. But wherever you have parties concerned in the equipping or fitting out or furnishing, or the attempting or endeavouring to do any of these things, either as shipbuilders, or as engineers, aiding in anyway whatever in any of them where there is a principal in the matter who has the intent, and is master of the employment, can there be any doubt whatever, that it is struck at by the statute? For, instance, suppose they constructed the vessel, meaning themselves to use their own ship as a privateer.” Now, therefore, I have my friend’s own statement: it is necessary here to fix upon some person or another in whom the intent existed.

*Mr. Baron Pigott.*—There is no doubt, that the intent of the two parties must be used in a different sense, the intent of the controlling power may apply to the principal, but then there is

ARGUMENT.

2nd Day.

"intention of using or employing the said vessel as a privateer, but intended, when he equipped her to go to the West Indies to endeavour to raise funds to prepare her for a cruise,—then the traverser is not guilty." (3.) "If the jury believe that when the 'Bolivar' was equipped at Baltimore and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the traverser is not guilty." Upon the second and third of these instructions so claimed, the decision was given in favour of the defendant.

*Mr. Baron Pigott.*—I suppose that the owner and the equipper was the same person there.

*Mr. Karlake.*—I think he was the same person.

*Mr. Baron Channell.*—The Court below seem to have thought that the intention was not only necessary but absolutely requisite.

*Mr. Karlake.*—No doubt, my Lord. In order that there may no doubt as to what the law, as it was laid down by Sir William Atherton, requires, I would ask your Lordships' attention to the end of the reply, or rather the summing up by Sir William Atherton. Your Lordships will find at page 223 of the small book the following passage: "Gentlemen, that brings us to the great question in the case with which my learned friend next dealt on the evidence. I mean the question of intent, because I have stated, and admitted throughout, that unless you are satisfied upon the evidence produced upon the part of the Crown that there did exist the intent, and I will very much adopt the view put forward by my learned friend as to the kind of person, with reference to the ship, by whom such intent must be entertained to fulfil the description of the intent, I shall come to that in a moment, but unless I satisfy you that the intent that the vessel should be employed by the Confederate States is made out, and an intent existing before the seizure and during the construction of the vessel, I have stated throughout, and I repeat that the information fails."

Therefore my learned friend assumes that which I venture to think he was bound to assume, namely, that it rested upon him to show that there existed an intent on the part of somebody, who was capable of exercising and carrying out such intent, that this vessel should be used by one belligerent against another, and he says that the intent, (which he admits must be a fixed intent) existed on the part of somebody (although he fixed on no person in particular), that the vessel should be used in the service of the Confederate States. At page 238 of the little book Sir William Atherton goes a little more at length into what he considers to be the law as regards the intent. "All that I ask you to do is this: You will take the law, as far as it affects your decision, of course from my Lord, the facts you will judge of on the evidence, no doubt availing yourselves of

“such observations on these facts as the great experience and knowledge of my Lord will suggest to him, or enable him to make available to you. I ask you to give your conclusion in this case on the evidence. If that evidence satisfies you that there did not exist the intent to which I have referred, and I will state at once what I intended to have stated a little earlier that so far I agree with my learned friend, that the intent must be an intent of one or more having at the time the means and opportunity of forwarding or furthering such intent by acts. I agree that anything else called an intent, or rather that which would be called an intent in the mind of any person not of this description, must be treated properly as a mere wish, imagination, or desire. By intent, undoubtedly, the Act means practical intent.” Therefore, that is the construction laid down by my learned friend at that time, and I believe that my learned friend, the Attorney General, now adopts it because in moving for this rule I think I understood him to say—

ARGUMENT.

2nd Day.

*Mr. Attorney General.*—I do not recede from that, and I could not express it better.

*Mr. Karlake.*—I think I understood him to say, what your Lordships will find at page 55,—“That there must be some person party to the business who is capable of having such an intent, and who is it? For example, if a shipbuilder in England builds on speculation on his own account a ship, intending to take it to any port in the world where he can find a market for it, it is obvious that he has not within Her Majesty’s dominions any intent to employ, or any power to employ the ship in the service of any belligerent power; all his intent is to sell the ship to a purchaser somewhere or other; or it may be in some particular place if he can find one there, and nobody but himself has any control over it at the time. Nobody but himself has anything to do with it at the time. Nobody but himself under the circumstances can determine the intent, and as he does not mean to make war in it himself, or does not intend that anyone else shall make war in it, that is not struck at by the statute. But wherever you have parties concerned in the equipping or fitting out or furnishing, or the attempting or endeavouring to do any of these things, either as shipbuilders, or as engineers, aiding in anyway whatever in any of them where there is a principal in the matter who has the intent, and is master of the employment, can there be any doubt whatever, that it is struck at by the statute? For, instance, suppose they constructed the vessel, meaning themselves to use their own ship as a privateer.” Now, therefore, I have my friend’s own statement: it is necessary here to fix upon some person or another in whom the intent existed.

*Mr. Baron Pigott.*—There is no doubt, that the intent of the two parties must be used in a different sense, the intent of the controlling power may apply to the principal, but then there is

ARGUMENT.  
2nd Day.

an intent also in the person who is aiding and assisting, and he has no controlling power, but he has the knowledge.

*Mr. Karlake.*—It will be found extremely material to discover what the real meaning of "with intent" is for the purpose of this case. I contend that it is incumbent on those who seek to claim the forfeiture of a vessel to point out some particular person who has the control of the vessel, who was the person *intending* at the time the acts which are charged as wrongful acts, were done. Your Lordships have been good enough to suggest that two sorts of intent are referred to here. I do not think it will be found to be so. The intent must exist in those who are "aiding or attempting to equip," as well as in those who equip.

*Mr. Baron Channell.*—I understood the Attorney General to contend upon his moving for this rule, that there must be, not only an intent, but coupled with it some power to carry that intent into execution. But with regard to those who aid or abet then it is not necessary that they should have the power. The words are "with intent or in order." No one has referred to those words yet.

*Mr. Karlake.*—Is it not intended by the Act that any person aiding in equipping a ship shall be liable to be indicted as a misdemeanant, unless the vessel has become liable to forfeiture.

*Lord Chief Baron.*—That is so, no doubt, but put such a case as this: I do not imagine that any one would contend that if any of the ship's carpenters, or persons who are merely inferior workmen, but still who are aiding, assisting, or advancing the work; that any intention on their part would be an offence against the Act, or make them liable to punishment, or incur forfeiture.

*The Attorney General.*—No; if that stood by itself, of course not, if there was no other intention.

*Lord Chief Baron.*—Even all our special pleading, and all our care about indictments upon Acts of Parliament, language is extremely imperfect, unless you carry along with the perusal of it, and the attempt to understand it, a candid and fair desire to know what it means.

*Mr. Karlake.*—Yes, what I want to impress upon the Court is this, that on the part of the person who is the owner or controller for the time being of the vessel, there must be that fixed intention which is mentioned in the case of the *United States v. Quincy*, and which is adverted to by Sir William Atherton in his speech, and that you must ascertain who is the person who has that fixed intention before you can claim the forfeiture of the vessel. It will be extremely material to bear that in mind when you find, as in this case, there are 20 or 30 persons charged with having said this or that about the vessel, and when my friend the Attorney General says, "They were all engaged together, and therefore you must assume the intent to be what we allege it to be." I can suppose a case where the person may



be guilty of an intention, and yet where no forfeiture of the vessel would be incurred. I will take this case—supposing every workman in Mr. Miller's yard at the time the vessel was being built was working upon the vessel with the firm belief that it was going to the Confederate States, and it turned out in evidence upon their being indicted under any one of the alternatives of this section that there was no such intent on the part of the person who had the control of the vessel. I say in that case they were not assisting with intent at all. Therefore it is most important to ascertain who is the person on whom my learned friend lays his hand, and says, This was the person who was the owner or controller of the vessel, and the person who I allege had the intent which renders the vessel liable to forfeiture; because the sole question is aye or no; is the vessel forfeited? And that was the question to be left to the jury. It was not a question as to whether certain persons were making observations from time to time which might tend to implicate them in the event of there being an indictment against them; but the question was really whether the Crown had satisfied the jury that there was a person who had control at the time of the vessel, who had himself formed the fixed intention in what he did on the vessel, of using the vessel for hostile purposes in the service of the Confederate States against the Northern States of America.

ARGUMENT.

2nd Day.

*Mr. Baron Bramwell.*—I am sure you would not labour this point Mr. Karlake unless it was of some importance, but do I understand you to say, supposing in this case the order had been given to Fawcett and Company to build the vessel and equip her, in order that she might cruize; they might say, and truly enough, we do not care what is done with her. We shall deliver her to the person who gave the order, and who has a right to the ship. But suppose they were making her in pursuance of an order given so that she might cruize, do I understand you to say that the ship would not be forfeited?

*Mr. Karlake.*—I am not sure; that is not this case.

*Mr. Baron Bramwell.*—I thought there was some tolerably clear evidence that whatever was true of those who gave the orders to the ship-builders was true of them.

*Mr. Karlake.*—No; when you come to look at the evidence your Lordship will find that they are statements made by the builders and not by those who come forward to claim the vessel, and who for the purposes of this case were admitted to be the owners, laying claim to the vessel. The statements were made by Miller, the builder, and Fawcett and Company had nothing to do with those statements.

*Mr. Baron Bramwell.*—This is the first case of a similar description that I ever met with. I don't mean under the Foreign Enlistment Act, but the first case of the kind. As I understand it, the Crown, by information, claimed the vessel as being forfeited. A. B. comes in and says the vessel is mine, and is not forfeited for the reason alleged; but surely A. B. can have no right to say, you must give no evidence except that

ARGUMENT.  
2nd Day.

which is said to be evidence against me. Surely the Crown has a right to say, if we cannot make our right against any one, we are content, the ship shall be yours, but if we can show that any one has forfeited it, we have a right to do so by all ordinary means in our power.

*Mr. Karlake*.—Yes; it may not be material who comes in for the purpose of claiming the ship. Still it is necessary that the Crown should lay their hands on some particular person in whom they assume the guilty intention existed which has rendered the ship forfeitable.

*Mr. Baron Bramwell*.—As I understand, it is matter of right for anyone to come in to make the claim.

*The Attorney General*.—Yes; and no verification is required beyond the affidavit of the Attorney that he believes his client to be the owner at the time of the seizure.

*Mr. Karlake*.—It does not affect the question the least in the world. The simple issue is aye or no, is the vessel forfeited? That is the question which is raised. Then I say that for the purpose of showing that the vessel is forfeited, it is the bounden duty of those who are making out the affirmative to show that at the time when they say the forfeiture was incurred there were some particular persons who were acting in some way or other against the provisions of the statute, who had the power of directing and controlling the movements of the vessel, and who had that guilty intention which it was necessary should exist. Supposing *Mr. Bullock* was saying this, or *Mr. Hamilton* was saying that, about this vessel, and the person in whose yard the vessel was, was saying something else about it, all that goes for nothing until you have fixed on some person who was the owner or controller of the vessel, and found that he had the guilty intention.

*Mr. Baron Pigott*.—If the man who had given the order for it had said it, what would you say then?

*Mr. Karlake*.—Was he in this country or not? I don't know where he is supposed to be.

*Mr. Baron Pigott*.—Supposing it was proved that A. B. gave the order and said,—“I mean it for the Confederate States.”

*Mr. Karlake*.—It might be evidence, but I must ask in what way the question would arise. The admission of any one person might be evidence as an admission in the event of there being an indictment against him. But I want to draw your Lordships' attention to the form in which this question is tried. The form is whether there is forfeiture or not. If there be an indictment against a person for knowingly aiding and assisting, and he chooses to say,—“I did knowingly aid and assist the person who “had the control of the vessel, and I did intend to send it out to “commit hostilities to assist a foreign Government,”—it may be very good evidence against him personally, by his own confession upon an indictment for misdemeanor. But what I desire to insist on is this, that the first step the Crown must take, according to my construction of the section, is to fix on some one

who, at the time they allege that the forfeiture was incurred, was the person who had the absolute control over the vessel, and then to show that in his mind that guilty intention existed which renders the vessel liable to forfeiture. That I say is involved in the question of intent; because when you find here the words, "with intent to cruise or commit hostilities," it seems to me obvious that, looking at the person who is to intend, as defined by the authority which has been cited, and as admitted by my friend, the first step in the case of the Crown is to ascertain the person or persons, who, having the control of the vessel, had formed this fixed intent, and then to show that that intent was formed under such circumstances as that the vessel was liable to forfeiture. Therefore, my Lords, the first question to be decided in this case, before we go into the question at all as to whether there was any fitting or equipping of the vessel, will be as to the true construction to be put upon this section as regards the intent in a proceeding of such a description as this, where the forfeiture of the vessel is claimed. And I say if the vessel had been fully equipped and armed that it would be important to look first at the question of the intent, because, however fully equipped or armed the ship might be, unless the intent was shown to exist, the Crown could make no case. In order to ascertain whether the intent existed, the first inquiry to be made was, who was the person who was capable of intending, within the meaning of the authorities on the subject, at the time of the forfeiture?

ARGUMENT.

2nd Day.

*Mr. Baron Bramwell.*—Let us understand. Ship ordered to be built. Orderer intending, when he has got it in his possession, to commence hostilities with it against the Act of Parliament; builders knowing it to be for that purpose.

*Mr. Karlake.*—The case your Lordship puts may happen.

*Mr. Baron Bramwell.*—There is the intent, and the intent in either of those minds would do. That would be sufficient would it not?

*Mr. Karlake.*—Yes, shown as a matter of fact, that there is intent in the person who has control.

*Mr. Baron Pigott.*—How can you get at the intent except by the acts?

*Mr. Karlake.*—That is what I want to contend against in this case. It is not because Miller, or somebody in his yard, says "this is my intent," that that statement is to fix guilt on the person who alone has the power of intending. Some one must be fixed upon as being the person who has the power of intending.

*Mr. Baron Bramwell.*—I should say that if the defendant could properly have got into the witness-box, and said that he stipulated that they should not have the vessel unless they gave a guarantee against its being used for the Confederate States, that then he would have negatived the assertion if there be any intent within the Act of Parliament.

ARGUMENT.

2nd Day.

*Mr. Karlake.*—Yes, my Lord, that would be so. But, my Lords, I contend that it is not necessary that any one should negative the intent until the Crown has pointed out the person in whom the intent existed; and in reading these words “with intent,” it is necessary, for the purpose of showing that the offence is complete, so far as the intention is concerned, and it is the duty of those who claim the forfeiture of the vessel to point out clearly and distinctly the person by whose “intent,” construed as it is in the case of the *United States v. Quincy*, by whose guilty intent it is that the ship became forfeited. Because I say that, unless that intent on the part of such a person is proved to exist in the first instance, no attempt can be proved, and no person can knowingly aid or assist; all the attempts and the aiding and assisting spoken of in the section must be attempts to carry out a design formed by a person who has the power of forming the design; that is, in other words, a person who has such control over the vessel that he himself can send it on any expedition he likes, it being found that the expedition on which he intends to send it is one of those expeditions prohibited by the 7th section of the statute. If reliance is placed on that part of the section which says, that a ship may be forfeited, and a misdemeanor incurred by an attempt, it becomes necessary to show that there is some person, either the person who has control, or some other person acting in furtherance of the design of that person, who is, with the intention of carrying out that design, doing something towards placing the ship in an armed condition. The next words “knowingly aid or assist,” require no explanation, because it is obvious from the introduction of the word “knowingly,” that it is intended that any person who is working about the vessel, unless acting in furtherance of the design of the owner or controller of the vessel, is not guilty of a misdemeanor or doing an act which may lead to the forfeiture of the vessel.

Then, my Lords, having made that comment on the intent provided for by the Act, we then come to the consideration of what the meaning of these words “equip, furnish, fit out, or arm” is. What is the meaning to be put upon those words?

*Lord Chief Baron.*—You are going to another branch of your argument, are you not?

*Mr. Karlake.*—Yes, my Lord.

*Lord Chief Baron.*—Then we will adjourn.

Adjourned until to-morrow at 10 o'clock.

## ARGUMENT—*continued.*

---

**THIRD DAY.—Thursday, 19th November 1863.**

---

ARGUMENT.

3rd Day.

---

*Mr. Karlake.*—My Lords, I commented yesterday upon the language of the 7th section of the Foreign Enlistment Act, so far as the intent was concerned, and I had taken that part of the section before proceeding to discuss the question as to the meaning of the words “equipping, furnishing, fitting out, or arming.” Now, before discussing the meaning of those words, it will be convenient to call attention very briefly to what I believe is the construction, as far as I can ascertain it, which was put upon that language by the late Attorney General in the conduct of the cause, and also by my learned friend the Attorney General in moving for the rule. It will be convenient to read the definition, which the learned Attorney General, in moving for the rule, gave of the word “equipping,” in the 7th section of the Act. I take the word “equipping” as the ruling word of this sentence. Now the learned Attorney General said, “The statute provides against any person doing any one of these things, it being in the disjunctive; it distinguishes them, and seems to be carefully worded in order to avoid the chicanery which would result from requiring some particular species of furnishing, some particular species of fitting out, some particular species of equipment, in order to make the act penal in a case in which the attempt is proved.”

*Mr. Baron Bramwell.*—Where is this, Mr. Karlake?

*Mr. Karlake.*—In the Attorney General’s motion, my Lord.

*Mr. Baron Bramwell.*—But where?

*Mr. Attorney General.*—At the top of page 56. I believe that this print has never been corrected, but your Lordships will easily perceive where errors occur.

*Mr. Karlake.*—What I am reading from seems to be correct. “I say that the whole gist there, is the intent and the purpose, and that any species whatever of equipment, however innocent, *per se*, any species whatever of furnishing, any species whatever of fitting out, whether with or without arming, is struck at by the Act, by its plain words, according to their natural meaning, (and that, I apprehend is their object and policy,) provided always that the intent and purpose

ARGUMENT.

3rd Day.

" is established. Now what are the words ?—' Equip, furnish, ' fit out, or arm.' If it had stopped there of course it would not have had the effect of prevention. The statute of course aims at prevention, not at punishment when the thing is done. The statute desires to stop the thing *in limine*, to cause the thing not to be done ; and therefore, instead of stopping at these words it goes on, ' or attempt or endeavour ' to do any one of these things ; so that however little progress may have been made, and in whatever imperfect condition the ship may be as to these things, when she is seized, if any step has been taken which is an attempt or endeavour to do any one of these things, provided it be a prohibited attempt, it is struck at ; and not only the attempt or endeavour, but any one who ' shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming.' " My Lords, I believe that in reading these words I have represented correctly the view which the learned Attorney General presented to the Court, and which I suppose he will again present to the Court in arguing this rule. I do not know whether my learned friend will admit, (because great caution was observed both by my learned friend and by the late Attorney General upon that subject,) that the sale of the hull of a vessel with no equipment at all, but simply the hull of a vessel, intended to be used when complete, in the service of one of two belligerents, would be an infringement of the Act, supposing the intent existed. I shall argue that it is not ; and that for the purpose of making out an offence under this Act, by equipping, or fitting out, it is necessary that there shall be, first of all, that in existence which may be called a ship or vessel, and then that that ship or vessel shall be equipped. My learned friend says that the equipment superadded to the ship or vessel may be an innocent equipment, and that an innocent equipment will render the ship liable to forfeiture ; whereas, on the other hand, we say that the equipment which is to be superadded to the vessel does not mean an innocent equipment at all, but means something of a warlike character.

Now, my Lords, to take an instance, one that seems to have been relied upon at the trial, and it may be a convenient instance by which to test the construction put upon the case by my learned friend. Mr. Barnes or Mr. Morgan,—I cannot be quite certain which of the witnesses it was, — after being asked about the stanchions for the hammock nettings, was asked a question as to whether the vessel had a lightning conductor—that will answer my purpose as well as any other equipment or any other matter which it is suggested was to be used as an equipment for the vessel. My learned friend's contention is this, that up to a certain point you may go on building the vessel whatever the intent may be (at least I assume it to be so) but that the moment you do that which, as distinguished from building a vessel, is found by the jury to be an equipment of the vessel,

although it may be reasonably found in vessels of every class and description, yet if it be an equipment, and the intention still continues to exist, the vessel is forfeited.

ARGUMENT.

3rd Day.

*The Queen's Advocate.*—What you have referred to was in Mr. Morgan's evidence.

*Mr. Karlake.*—The argument is that the lightning conductor added to the hull of the vessel enables the Crown at once to seize the vessel as forfeited, because there is something in the nature of an innocent equipment on board that vessel.

Now, my Lords, will the words of the Act bear that construction? I call your Lordships' attention to this more particularly now, because it will be material with reference to the summing up of the learned Chief Baron, and the charge which is now made of omission in the summing up. If your Lordships look through the notes of the trial, it will be found that throughout the trial the question raised on the part of the Crown as against that raised on the part of the claimants, was whether an equipment, even an innocent equipment, was or was not sufficient to forfeit the vessel, it being alleged on the part of the Crown that it was so; whereas it was alleged on the part of the claimants that as long as they fitted the vessel without putting on board equipments of a warlike character, no forfeiture was incurred.

Now, the clause, as your Lordships see, although it may have been suggested by the clause in the American Act certainly is not copied from that clause. The words relating to transports are not found in the American clause at all; the collocation of the words is different, and the words themselves of the American clause are in many respects very different indeed from those which are found in this clause.

*Mr. Baron Channell.*—In the American Act it is "and" instead of "or?"

*Mr. Karlake.*—Yes, my Lord; and afterwards the word "or" is found in the clause of that Act; and it is suggested that you may frame an indictment against an aider and abetter for fitting out without saying "arming," and that that indictment would be good, although if you indicted the principal under the American Act you must say "arming and fitting," or else it would be bad,—a somewhat strange conclusion.

*Lord Chief Baron.*—If you consider it, I think you will see that a man who takes a part and assists in doing a part which is necessary to the whole, may possibly have nothing to do with the other part. Take a familiar instance:—Suppose it were an offence to travel from London to Windsor, or to make any attempt, or to assist anybody in doing so; a man who assisted a person to travel from London to Hounslow might be accused of that which is part of the journey, he having nothing upon earth to do with the other part. That makes the matter intelligible in the view which I take of it. If it is an offence to equip and arm, and a certain person, who may for this purpose be called the principal, intends to equip and arm, anybody who assists him in

ARGUMENT. the equipment, without any reference to the arming, may be guilty of the offence.

3rd Day.

*Mr. Karlake.*—That may be so, my Lord.

*Lord Chief Baron.*—It does not occur to my mind that there is any difficulty in it at all. The principal person must intend to do both. If he intends only to go to Hounslow when the offence is not perfect unless he goes to Windsor, you cannot indict him for going to Hounslow.

*Mr. Karlake.*—No, my Lord, and I again suggest that that would be so, though the person who is alleged to “attempt” thought that the person whom he assisted meant to go to Windsor; he could not be found guilty as an accomplice, because it could not be shown that the alleged principal had committed an offence.

*Mr. Baron Channell.*—If you take the 3rd section of the American Act as an instance, you will find that the words are in the conjunctive when the statute deals with the principal; and when it comes to a person who may be treated to a certain extent as an accessory the word “and” is left out and the word “or” is substituted.

*Mr. Karlake.*—Yes, my Lord, but I should have thought that the same person who might be indicted under the words of the first part for “fitting out *and* arming,” might be indicted for “attempting to fit out” without saying “arming” at all.

*Mr. Baron Channell.*—As I understand it, the American decisions do not go that length. There is a case in which they decided that you might charge an attempt to fit out without charging an attempt to arm; that was the case of Quincy, where he was concerned not as the actor, but as a kind of accessory to the principal. The words of the 3rd section of the American Act are “if any person shall, within the limits of the United States, “fit out and arm, or attempt to fit out and arm, or procure to be “fitted out and armed.” I suppose that that is treating with the principal person; there it is in the conjunctive; then come the words, “or shall knowingly be concerned in the furnishing, “fitting out, *or* arming.”

*Mr. Karlake.*—Yes, my Lord.

Now, my Lords, the distinctions which will be found between this section and the 7th section of the Act of 59 of George III., are very obvious and manifest. I am not dwelling upon the conjunctive, “fit out and arm,” but the words are so much clearer than those to be found in the section of the English Act that there can be little difficulty in ascertaining what the real meaning of the first part of this clause was, for the purpose, at all events, of framing an information or an indictment. The difficulty of construing the 7th section of the Act of 59th of George the III., has occurred to my learned friends, as will be seen by the way in which this long information is framed. The third section of the American Act is, “If any person shall, “within the limits of the United States, fit out and arm, or



"attempt to fit out and arm," and so on, "any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruize," and so on—the intent is that the ship shall cruize in the service of a foreign state. Many of the counts of this information follow that which is certainly the grammatical construction of the 7th section of the English statute, and charge the offence as being that certain persons equipped, fitted out, and armed a ship or vessel with intent to cruize and commit hostilities;" and clearly, according to that construction of the statute, the intent is charged against the person who fits out the vessel; and I apprehend, looking at the history of the Act, and the occasion upon which it was passed, that was really what the Legislature intended. But there is another construction which is put upon the Act by my learned friends in argument, and adopted in some counts of the information, and that is this:—That if any person shall fit out a vessel with intent, or in order that the vessel shall be employed with intent to cruize and commit hostilities,—putting in both the intents in those counts of the information. My Lords, I do not propose to consider now which of those constructions is the correct construction. It may be that the first is the correct one; it may be that my learned friends are justified in construing the statute as being a statute in which the intent which is mentioned is an intent that the vessel shall be employed to commit hostilities, and not that the persons fitting out are themselves intending to commit hostilities in the vessel so fitted out. The first construction may be that which was intended to convey the true meaning of the Legislature.

But, my Lords, having called your Lordships' attention to what has been said by my learned friend the Attorney General as being his interpretation, namely, that, assuming the existence of a ship, any innocent equipment is within this section, I venture, on the other hand, to put the construction which has already been presented by my learned friend Sir Hugh Cairns. My learned friend the Attorney General puts the very widest construction that can by possibility be put upon the section; he denies that it is necessary that the equipment should be a warlike equipment at all. My learned friend Sir Hugh Cairns on the other hand contended that when you look at the word "equip" in connexion with the rest of this clause, it is quite obvious that the meaning of "equip" must be either, that there shall be an equipping in a warlike manner partially, or that the vessel shall be so equipped for war that she shall be ready to commit hostilities as soon as she leaves a port of this kingdom. Now, Mr. Baron Bramwell, I think, kindly suggested, in the course of Sir Hugh Cairn's address, that probably the wider construction, namely, that the equipment must be such as fits the ship for carrying on hostilities, which it is unnecessary to contend for now, may be the proper construction. I apprehend that it will not be denied that this section only applies to a case where war is actually going on

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

between two foreign belligerents,—that it will not be said that it was intended by this section to prohibit the sailing of armed vessels to a power which was likely to go to war and contemplated going to war with another state; that there must be existing hostilities, and that it is only to such a case that the statute applies.

Now, if your Lordships look at what the intention is, either in the persons who fit out the vessel, or in those who deliver the vessel to be employed,—the object clearly is that the vessel shall cruise and commit hostilities. Does that mean that she shall be equipped in such a manner as to cruise and commit hostilities, or that an innocent equipment is to cause the vessel to be forfeited if the intention exists? Your Lordships have to judge between the two constructions; and while it is asserted by my learned friend that your Lordships should construe the Act by saying that the vessel must exist in the first instance, and then, supposing the existence of the vessel, any innocent equipment added to that vessel with the intent is sufficient to forfeit it; on the other hand it is suggested that, looking at the whole of this section, and the object with which the Act was passed, it is necessary either that there should be such an equipment as will enable the vessel to take the seas ready for aggression or defence,—or that at all events the equipments struck at by this section must be warlike equipments, and that if they are found to be innocent equipments, then the section does not apply.

Now I do not know that I can urge anything further than has been said by my learned friend upon this subject. Your Lordships' attention has already been called to the next section of the statute, which says in so many words, as I apprehend, that you may equip a vessel of war belonging to a belligerent which seeks safety in these ports; that you may equip her to any extent you like so long as the equipments are innocent equipments. What that section provides against is adding to her warlike equipments; and I contend it is said therefore that you are not prohibited from furnishing a vessel of war which seeks a refuge in the ports of this country with anything in the nature of equipment that she may require so long as it is of an innocent description. You may not increase her armament, it is true, but while it must be admitted on the part of the Crown that you may furnish equipment of an *innocent* character to a foreign belligerent war vessel it is contended at the same time that you must not build a ship and then put a lightning conductor on board, because you are superadding an innocent equipment to the hull of a vessel already constructed. My Lords, I submit that that is rather an unreasonable construction, and more unreasonable when your Lordships find the circumstances under which this Act was passed, and what, as I venture to think, the Act was intended to prohibit.

*Mr. Baron Pigott.*—The Act uses the words “equipment for war” in that section.

*Mr. Baron Bramwell.*—That is your argument, because you say that that shows that any other equipment is lawful.

*Mr. Karslake.*—Clearly, my Lord.

*Mr. Baron Bramwell.*—The consequence therefore is, that a belligerent's own vessel of war may be equipped in every sense, provided the equipment is what you have designated as innocent.

*Mr. Baron Pigott.*—You may go further than that,—you may include her arms, only you must not augment the arms.

*Mr. Karslake.*—That, probably, is so also; it would make it all the stronger. I am glad to hear the learned Judge say that that is the construction of the statute. The words to which Mr. Baron Bramwell called attention yesterday, strengthen the construction which we put upon the Act, and show that the meaning of the Act is that a vessel shall not be so equipped as that she shall be in a condition to commit hostilities upon leaving this country. When your Lordships look at the history of the Act, that is by no means an unreasonable conclusion. There is a prohibition upon the ship-builder to some extent (and it is for your Lordships to say to what extent) he may not "equip" a ship, but it is clear that according to law although he may not equip a ship, whatever that may mean, (I say equip for warlike purposes,) although he may not equip a ship in the ports of this country, he may in this country sell every part of a vessel, so long as the parts are not put together in this country, and he may sell all the arms and ammunition required for a ship of war, and I think that that consideration, as well as others which have been pointed to by my learned friend Sir Hugh Cairns, will have a very material influence on your Lordships' minds in putting a construction upon the words of the Act.

My Lords, I say, therefore, that looking at the history of the Act and the occasion which led to the passing of it, and looking at the right of the merchant in this country to sell contraband so long as it is not in a complete state, (and when I say "contraband" I allude to ships,) looking at the fact, that the sale of the parts of a vessel of war is not a misdemeanor, I ask your Lordships to put a reasonable construction upon the Act and to say that the equipment aimed at and prohibited must either be of such a character as that the ship shall be useful at once for aggressive purposes, or that, at all events, the equipment to be commenced must be a warlike equipment, and that my learned friends cannot successfully contend that an innocent equipment superadded to a vessel, renders that vessel liable to forfeiture.

My Lords, of course I shall hear again in the course of my learned friend the Attorney General's speech, that which was urged during the trial, and which was urged by my learned friend at the time when he moved for the rule, namely, that unless the construction which he asks your Lordships to put upon the Act be adopted this Act will be a dead letter, and may at once be blotted out of the Statute Book. I say by no means. I say that there are offences created by this Act, according to the construction which we put upon it, which may well be guarded against; and I say further that by our construction of the Act great evils will be provided against, although not perhaps the whole evil

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

which, according to my learned friend, the statute was intended to prevent. I have no doubt we shall hear again of what are called evasions of the Act. My Lords, I dispose of those so-called evasions, by saying that if a new statute creates a new offence, a person, by doing a particular act, either commits the offence or does not commit the offence, and he has a right to do, after the statute has passed, that which he had a right to do before, unless he can be clearly proved to infringe the Act by what he so does.

*Lord Chief Baron.*—Forgive me for suggesting that the expression “a new statute creating a new offence,” does not, I think, give the fullest effect to what I apprehend is the argument which you are about to propound. The expression rather means, a new statute which makes that a crime which was perfectly lawful before.

*Mr. Karlake.*—I am much obliged to your Lordship.

*Lord Chief Baron.*—A new statute may deal with something which was unlawful. There are many things which are unlawful, which are not punishable,—which are not criminal. But this is a case where that which was perfectly lawful before, is made a crime. There is no doubt, according to all the authorities, and there is not the slightest doubt now, that a neutral may furnish to a belligerent every possible description of warlike weapon or munition of war,—every possible ammunition of every kind,—and I think that no one can say that until the passing of this statute there was any known distinction by the law of nations between a ship and a gun. You may now supply a gun for a ship, you may now at Birmingham, or in any other part of the kingdom where there is a foundry sufficient for the purpose, order a gun, and you may say, “This is for one of the belligerents, to be taken to one of their ports, and put on board a certain ship to be expressly used for the purpose of the war which is now carried on against a power with whom you are at peace.” You may do that, and I am not aware that you cannot do that with reference to a ship, but there is a doubt about it. No doubt you may now order a gun for a ship; whether you may order a ship for a gun seems to be a question. I think that the fullest effect is given to the argument which you are about to urge, as I apprehend and anticipate, by drawing attention not to the fact that the statute is creating a new offence, but something more than that—it is making that which was perfectly lawful before in every sense a crime and a misdemeanor.

*Mr. Karlake.*—Yes, my Lord.

*Mr. Baron Bramwell.*—That is the argument on the other side.

*Mr. Karlake.*—I was going to add this; in anticipation of an argument which will be used for the Crown, probably a great number of instances which will be suggested, by which what my learned friend chooses to consider the spirit of this Act or the language of this Act can be evaded. I dare say there are a great many cases in which it might be evaded according to my learned

friend's construction of it. It may be said that if a vessel of war belonging to the United States is four miles from the coast of England, it will be an evasion of the statute to carry out guns or other munitions to that vessel; but I do not find that the law prohibits that. There are many cases where the act of supplying contraband to one belligerent is just as likely to irritate and vex the other beligerents, as that which is struck at and prohibited by this statute.

My Lords, the statute therefore was passed, as I say, with a view to prevent our subjects from fitting out and equipping war-like expeditions from our shores. According to the history and occasion of the Act, and as I say, according to the preamble of the Act, that was what was intended to be provided for.

*Mr. Baron Bramwell.*—To prevent our ports becoming stations of hostility.

*Mr. Karlake.*—Yes, my Lord. My Lords, it may be that the preamble of the Act carries it further than was intended; but it is for your Lordships to say, in giving a reasonable construction to a penal statute, whether any equipping, however innocent, of an innocent vessel, that is to say, of a vessel not fitted for war, is prohibited by this Act, or whether something more must not be done before the vessel is to be forfeited, and all the persons assisting made liable to be punished for misdemeanor.

My Lords, as regards evasion of the Act, I will ask your Lordships, instead of taking my language upon the subject of evasion, to adopt that which will be found in a note to Wheaton's last edition on International Law, the words of a very distinguished person in this country upon the subject of the evasion of this very statute. My Lords, they are contained in a letter of Lord Russell to Mr. Adams with reference to the celebrated vessel No. 290, or the "Alabama." Great remonstrances had been made upon that vessel not being seized.

*Mr. Baron Channell.*—What is the page?

*Mr. Karlake.*—Page 735, my Lord.

*Mr. Baron Bramwell.*—Is that the American edition?

*Mr. Karlake.*—Yes, my Lord; the edition of 1863 just published. This is published in London by Sampson Low & Co., and is also published in Boston. My Lords, the part which I will adopt as a part of my argument upon the subject of the evasion of municipal laws is this; it is contained in a note written on the 16th of October 1862, from Lord Russell to Mr. Adams, acknowledging the receipt of further evidence as to the gun-boat "Alabama." "With reference to your observations with regard to the infringement of the Enlistment Act, I have to remark, that it is true that the Foreign Enlistment Act, or any other Act of the same purpose, can be evaded by very subtle contrivances; but Her Majesty cannot on that account, go beyond the letter of the existing law." Now that is the view which I shall ask your Lordships to take of the argument as to evasion. I shall ask your Lordships to see what the crime

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

is which is provided against by the statute, and then to see whether the facts of this case clearly make out that any such crime has been committed.

*Mr. Baron Bramwell.*—Will you let me see that book?—[*The same was handed to his Lordship.*]

*Mr. Karslake.*—Now I stated to your Lordships that I did not think it necessary in the view which I entertained, and the view entertained by my learned friend, to go into any lengthened disquisition on the evidence in order to show that the verdict was perfectly warranted by the evidence, supposing that the ruling of the learned Lord Chief Baron was correct. My Lords, if it had been necessary to do that at all, it was done by my learned friend Sir Hugh Cairns, and the evidence in the case is fully before your Lordships. As I have already said, I understand my learned friend's objection to amount to this, that assuming his construction of the statute to be correct, then the evidence would have warranted a different verdict. My Lords, I did not understand my learned friend when moving for the rule to say that, assuming that the learned Lord Chief Baron laid down the law, as I venture to think he did, the jury were bound to adopt any other view than that which they did adopt, or come to any other conclusion than that to which they came.

Now, I must ask your Lordships before suggesting what was left to the jury by the learned Lord Chief Baron, to see what turn the case took, and what was admitted to be the state of things as regards this boat, the "*Alexandra*." It was admitted, beyond all question, that she was not armed. It was stated in the strongest language, as I understood it, that the real question which there was between the Crown and the claimants was this,—as to whether the construction which was put by the Crown upon the statute was correct, or whether the claimants were justified in arguing and submitting to the jury that even if they thought there had been anything superadded to the vessel or ship as suggested by the Crown, such superaddition not being of the distinctive warlike character suggested by my learned friend, there was not an infringement of the Act. Now, it being admitted that there was no arming of this vessel at all, of course there were other things which had to be relied upon as being the equipments which, as my learned friend says, brought this vessel within the Act. The whole question was, whether those equipments brought the case within the statute, or whether my learned friend Sir Hugh Cairns was right in arguing either that there must be a complete arming of the vessel, or if not a complete arming of the vessel, a warlike equipment of the vessel; that is to say, an equipment of a distinctive warlike character, in order to bring the case within the Act. My Lords, I find with some surprise that a charge is now made against the learned Lord Chief Baron that when he left the case to the jury and commented upon the equipment and fitting out mentioned in the section, and called their attention pointedly to that, he did not

upon every occasion read to them the whole of the words of the section, namely, the words "attempt or endeavour to equip, "furnish, or fit out, or procure to be equipped, furnished, or "fitted out, or knowingly aid, assist, or be concerned in the "equipping, furnishing, or fitting out."

*Mr. Baron Bramwell.*—I do not see that the learned editor of Mr. Wheaton's book takes any exception to Lord Russell's letter.

*Mr. Karstlake.*—No, my Lord.

*Mr. Baron Bramwell.*—I do not think it is perhaps of very great moment.

*Mr. Karstlake.*—I only read it from that book because it happened to be in my hands.

*Mr. Baron Bramwell.*—I do not think that he does take any exception to it.

*Mr. Karstlake.*—No, my Lord.

*Mr. Baron Channell.*—I do not see how he could.

*Mr. Attorney General.*—He gives a record of certain events and expresses no opinion upon them.

*Mr. Karstlake.*—My Lords, it being understood therefore that the vessel was admitted not to be an armed vessel, what I was saying was, that the issue raised, as I apprehend, between my learned friends and ourselves was this: First of all as to whether it was necessary in point of law that it should be a warlike equipment, and next whether the intent existed, as they say it did; by some person capable of exercising the intent; and I say that the objection taken by the rule on the ground that the learned Lord Chief Baron did not properly direct the jury only amounts to this, namely, that when the learned Lord Chief Baron gave his views to the jury, he did not, when he used the word "equip," go on to use the words "or attempt or endeavour to equip, or procure "to be equipped." My Lords, that objection being taken at this stage of the proceedings, one would have thought in common fairness, especially after my learned friend, the late Attorney General, had said that he relied only upon the first eight counts of the indictment, my learned friends who appeared for the Crown, and who sat by when the learned Lord Chief Baron was summing up the case, would have called his attention to the other words of the statute, and asked some special direction to be given upon that subject. I do not find that anything of the sort occurred, and that which had been the main struggle between the Crown and the claimants, and to which his Lordship addressed himself in summing up, was the matter which was really left to the jury, and which satisfactorily disposed of the substance, at all events, of the case.

Now my Lords, what was it that the learned Lord Chief Baron laid down to the jury? I apprehend that he laid down that which my learned friend has already suggested to your Lordships, and that his Lordship most distinctly left the question of intent to the jury.—

*Mr. Baron Pigott.*—I observe that in the summing up the Lord Chief Baron speaks of the 70 counts.

Argument.

3rd Day.

ARGUMENT.

3rd Day.

*Mr. Karlake.*—Yes, my Lord, that was doing the information injustice, there were 98 counts.

*Mr. Baron Pigott.*—He leaves that to the jury.

*Mr. Karlake.*—Yes, my Lord. My Lords, surely I may ask when an information is framed upon an Act of Parliament which contains a number of different words, and when the learned counsel for the Crown opens the case and says "There is only one substantial question; you may dismiss from your minds the whole of this voluminous indictment except the charge contained in the first eight counts;" and when that is the question fought from first to last, is it fair that when the case is moved in this Court it should be suggested that his Lordship in his summing up to the jury did not repeat all the different words found in the Act of Parliament; and that because he did not repeat all those words from time to time, there has been a want of direction or a misdirection on the part of the learned Judge? My Lords, the case must be looked at with reference to the way in which the case was opened and the mode in which the case was at last left to the jury; because if your Lordships find that there was really a dispute between the Crown and the claimants as to whether an innocent equipment was an equipment within the statute; if that was said to be one point, and if another point was made, whether a ship or vessel had been so far matured as that it could be equipped within the meaning of this statute, and was in a state capable of being equipped; and if a third question was as to whether the intent which was suggested, (supposing any definite intent was suggested,) had been proved; if those were the questions in the issue which arose between the Crown and the claimants, and if those matters were substantially left to the jury, then I submit that my learned friends have no right to come here and say that there are certain words in the Act of Parliament technically creating a different offence, which words were not left to the jury from time to time in the summing up.

*Lord Chief Baron.*—It was distinctly put to them whether there was any attempt.

*Mr. Karlake.*—So we say, my Lord; but from the rule I infer that my learned friend says that it was not left. I say that it was substantially left; but in the course of the summing up your Lordship does not go on to say time after time the same thing; and there are the counsel for the Crown sitting by and intending to take an objection that that is not sufficiently pointed out to the jury, and yet they never suggest to his Lordship that he should read the words of the section through time after time, and that whenever he spoke of the words "equipping or fitting out," he should say "attempting or endeavouring to equip or fit out."

Now I submit that first of all his Lordship stated to the jury that the building of a ship, *simpliciter*, as distinguished from equipping, whatever that might be, is not prohibited by the statute. That ruling, I take it, my Lords, is obviously correct, when your Lordships find that in this statute the word "build,"



apparently advisedly, is left out. Moreover, it is correct, for this reason, that it is not a ship to be forfeited, which a person intends hereafter to equip, but the ship to be forfeited is a ship which is equipped or fitted out, or with respect to which there has been an attempt made to equip or fit out. Therefore I apprehend that his Lordship was right in telling the jury, "If you find that this is, *simpliciter*, a ship not equipped or fitted out, or attempted to be equipped or fitted out, that is not within the statute."

Then, my Lords, there is another direction to the jury with which I apprehend my learned friends quarrel, and that no doubt raises a fair point for discussion, namely, whether his Lordship was right in rejecting the view which was pressed upon him by the learned Attorney General, that supposing the ship existed, an innocent equipment of that ship was within the statute.

*Lord Chief Baron.*—By "innocent" you mean unwarlike?

*Mr. Karlake.*—Yes, my Lord. I think that my learned friend, the Attorney General, has stated what his view of the law is; it is in point of fact the same view as was stated by Sir William Atherton.

*Mr. Attorney General.*—That which may be *per se* innocent; that is to say, dissociated from the intent.

*Mr. Karlake.*—"Any species whatever of equipment, any species whatever of furnishing," and so on.

*Mr. Attorney General.*—"However innocent *per se*."

*Mr. Karlake.*—My learned friend again suggests that the putting up of a lightning conductor is an equipment which renders this vessel liable to be seized, if there be an intent that she shall be used for the purpose of committing hostilities; and that, although that is an innocent equipment *per se*, she is, nevertheless, within the section, and according to this section liable to be forfeited.

Now, my Lords, his Lordship refused to adopt the view of the learned Attorney General, and adopted a different view, and said, that in his judgment this equipment, innocent *per se*, even with intent, would not render the vessel liable to forfeiture; and that as regards the question of intent, which was of itself alone sufficient to dispose of the question, he asked the jury whether there was an intent to equip, and whether there was an intent to equip with a view that that vessel should be employed by one belligerent against another.

My Lords, if that was the direction to the jury (and I apprehend that it will be clearly found that that was the direction of his Lordship), is that direction to be quarrelled with, looking at the way in which the case was presented to the jury and to his Lordship, because his Lordship did not go on to submit questions repeatedly to the jury on sets of counts in the indictment which were practically abandoned?

*Mr. Baron Channell.*—Is that so? You may be right, but I do not read the opening speech of the Attorney General as

ARGUMENT.

3rd Day.

ARGUMENT.  
3rd Day.

amounting to an abandonment of all the other counts. The first eight counts are confined entirely to the equipment; each of those counts charges the equipment, and rings the changes upon the word "equip." Then comes the furnishing, and the same changes are rung upon the furnishing. There is then the fitting out. I do not think that the Attorney General said that he abandoned all the other counts.

*Mr. Karlake.*—As I understand it, the issue at the trial was this: Has this vessel been equipped?

*Mr. Baron Pigott.*—The Lord Chief Baron does not, I think, seem to have taken it so at the trial, if you look at his summing up.

*Mr. Karlake.*—As I understand it, an insufficient direction is complained of with regard to those words.

*Mr. Baron Pigott.*—We are not now upon those words, but upon the point whether all the other counts were abandoned.

*Mr. Karlake.*—When I say "abandoned," the expression is not strictly correct.

*Mr. Baron Channell.*—You have read the passage very correctly, but I was only drawing your attention to the question whether it amounted to that.

*Mr. Karlake.*—The Attorney General did not say, "I enter a *nolle prosequi* upon those counts;" but the whole course of the trial shows what the issue was which was raised between the parties; and it is hard to say that because the Lord Chief Baron did not use the words, "equip, or knowingly aid, or assist in equipping," it is to be held that there has been an imperfect direction upon those counts.

*Mr. Baron Pigott.*—What I understood you to say is, that the question was not fought as to "attempting or endeavouring."

*Mr. Karlake.*—No, my Lord; the questions raised were first of all the question of law, and then the question of intent. First of all it was an admitted fact that there was such a vessel as the "Alexandra" in some state of completion. Next, it was an admitted fact that she had stanchions fitted in her side for the purpose, as it was said, of afterwards receiving hammock nettings. Then the contention on the part of the Attorney General was, "I say that beyond all doubt these are equipments. That is not a question of law, and I ask you, the jury, to find the fact that those were equipments. Next, I ask you to find, although those equipments were innocent *per se*, that there was an intent to use the vessel so equipped (if you find that she was equipped) for the purpose of committing hostilities; and if so, I say, as a matter of law, I am entitled to the verdict." On the other hand it was said, "First of all, we deny that there was any equipment of any sort or kind. Next, we say that supposing the jury should consider that there was an equipment in any sense, it was not that equipment to which the statute points. Thirdly, we say that even supposing the vessel was equipped, there was not that intention which you

"allege, and which we say you are bound to prove." All those matters went to the jury, and upon all those matters the jury found for the defendants.

ARGUMENT.

3rd Day.

*Mr. Baron Bramwell.*—Upon some one or more.

*Mr. Karlake.* -- Upon some one or more; it may be upon one, it may be upon some, or it may be upon all; but it is quite sufficient for us to say that those matters were submitted to the jury, and that upon those matters they have given their verdict. My Lords, I therefore do not propose now to go through the evidence in order to show that in that view the jury were perfectly justified in finding the verdict which they did; they could hardly have found any other verdict.

*Mr. Baron Bramwell.*—Supposing that you had had undeniable evidence; supposing that one of the defendants had been called, and had said, "I admit that the vessel was to be fitted out here, so that she could sail to Madeira," or wherever you like; "I was to have nothing to do with her then, but I know that she was then to be armed; and I know that she was then to cruise against the United States; I confess that I fitted her out with a view to all those things following therefrom;" would that be a fitting out with the intent that she should cruise?

*Mr. Karlake.*—Your Lordship says, "I fitted her out:" To what extent? Does that mean so as to make her sail?

*Mr. Baron Bramwell.*—I will use your own expression, which, I think, is a very convenient one. "I fitted her with an innocent fitting, with a view to enable her to sail to the coast of Africa."

*Mr. Karlake.*—According to my construction, I should say that that would not be such a fitting out.

*Mr. Baron Pigott.*—And he might go on to say, "I know that if I had not fitted her as I did, she would have been taken by one of the belligerents immediately outside the English territory."

*Mr. Baron Bramwell.*—"If I had not fitted her out as I did she could not have gone out at all. I fitted her with sailing apparatus. I am a strong Confederate partisan, and I did it in order that she might be armed on the high seas, and cruise."

*Mr. Karlake.*—I should say that it was no more an offence within this Act than if he had sent out in another vessel the iron plating of a vessel which was lying wherever you please abroad, and which was intended to be put on board that vessel, and used in that vessel for warlike purposes.

*Mr. Baron Bramwell.*—I throw it out for your consideration, if it is worth your notice. It may possibly be said that you are not only to look at the proximate cause, but that you must look at the proximate object as well. The rule applicable to the proximate cause, I apprehend, is applicable also to the proximate object.

*Mr. Karlake.*—My answer to the question would be, that that would not be an offence within this statute.

ARGUMENT.  
3rd Day.

*Mr. Baron Bramwell.*—You say that it must be his immediate intent.

*Mr. Karslake.*—Yes, my Lord, but it may not be necessary now to go to that extent. In this case it may be quite sufficient for us to say that the equipment must be a distinctly warlike equipment. But I say that, construing the statute fairly, we have a right to go even further than that, and to say that the object of this statute was, that you shall not make one of the ports of this country a port of departure for ships fitted for aggression.

*Mr. Baron Bramwell.*—It is very possible that the statute, in its anxiety to prevent what was objectionable, may have said, "We will prevent also that under colour of doing which the objectionable thing may be done;" and therefore the legislature may have said, "We will prohibit that which international law does not prohibit." Now, I own that it is put in a captivating way to my mind. See if there is the fact, namely, the equipment; see if there is the intent, namely, to commit hostilities; if the two things concur, however irrational it may be to suppose that a vessel with an innocent equipment could commit hostilities, still that will be enough. Then another way in which it is put is the view which I have suggested to you, namely, that you may look not only at the immediate intent, but at all the intents intended to follow in any train of causation.

*Mr. Karslake.*—Or expected to follow. There comes the great difficulty.

*Mr. Baron Pigott.*—I dare say that the words of the section where the forfeiture is described, and where it is said what shall be forfeited, have not escaped your observation?

*Mr. Karslake.*—They have not, my Lord; "the tackle, apparel," and so on.

*Mr. Baron Pigott.*—Yes, and not only that, but it forfeits "every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to, or be on board of, any such ship or vessel," apparently contemplating that there may be none on board.

*Mr. Karslake.*—I do not know, my Lord. It is the ship with her tackle, apparel, and furniture, no doubt. My Lord, the earlier part of the section provides for that. I say that you do not forfeit a ship *simpliciter*, but that you forfeit an equipped ship.

*Mr. Baron Bramwell.*—With great respect, I cannot concur in that; because, suppose that a man was attempting to fit her out, that is to say, suppose that he had brought down to the water side the guns and powder, and the crew, and was stopped at the moment he was doing it.

*Mr. Karslake.*—That is because I did not go on to say "or attempted."

*Mr. Baron Bramwell.*—I cannot think that it is an argument against you to say that the statute contemplates that the vessel may be forfeited if there are no arms on board, because she may

be forfeited if her armament is brought down to the water side, and she is stopped at the moment of taking it on board.

ARGUMENT.

3rd Day.

*Mr. Karlake.*—I thought that my learned friend Sir Hugh Cairns had gone into that matter to the fullest extent. If a person has under his control several cannons, and is putting them on board with that intent, the vessel, with her guns, would be forfeited. Looking at the whole of this section together, the object is apparently that the ports of this kingdom shall not be made ports of departure for vessels equipped for aggressive purposes, and that an attempt shall not be made to use them as such.

*Mr. Baron Bramwell.*—Stations of hostilities?

*Mr. Karlake.*—Stations of hostilities, if your Lordship likes to take those words.

*Mr. Baron Bramwell.*—It is not my expression.

*Mr. Karlake.*—I am much obliged to your Lordship for it. My learned friend Sir Hugh Cairns, pointed out that when you are talking of the facility of evading a statute of this sort, you can see how easy it is to evade, as it is called, that part of the statute which says, "or shall within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel." You may go outside this realm and deliver the commission, but you may not do it inside this realm. I suppose it will be said, that if you go outside the realm, you are evading the statute. I say that you do not do that which the statute prohibits; and if you do not you commit no offence. Your Lordships will construe the statute by ascertaining what the circumstances were which led to its enactment, and what the evil was to be provided against, and then put that reasonable interpretation upon the words "equip," and so on, found in the statute, which you consider to be the true meaning of a statute framed in doubtful and ambiguous language, creating an offence and attaching a very considerable penalty to that offence. I submit that, according to the reasonable construction of the statute, the vessel must be equipped for hostile purposes when she leaves this country; or that, at all events, the equipment added to a vessel in the course of building, must be an equipment of a distinctive warlike character, and that an equipment of an innocent character, even though the intent may exist, will not render the vessel liable to forfeiture.

*Mr. Mellish.*—My Lords, I am on the same side as my learned friends; and certainly, if this was any ordinary case before your Lordships, I should almost be ashamed to enter upon any argument after the matter has been so thoroughly gone through as it has been by my learned friends who have addressed your Lordships before me; because I feel that it is difficult to say anything without, to a certain extent, repeating what has been said before; but yet the matter is of such very grave importance that I do not think I should perform my duty either to your Lordships or

**ARGUMENT.** to my clients, if I did not shortly, even though I may to some extent repeat what has been said before, state what is the view which I venture to take of this section which is to be construed by the Court.

**3rd Day.**

*Lord Chief Baron.*—We should be very sorry if you were to shorten your argument in the smallest degree. It is a subject which, no doubt, is of extreme importance, and the interests of this country are in various ways involved in it. We shall hear with very great satisfaction whatever will tend to throw light upon the subject, and I do not think that anything which comes from you will not have that tendency.

*Mr. Mellish.*—Having had a little experience of the great ability of my learned friend the Attorney General, I know his great skill in remarking upon the different views which have been taken by the different Counsel who are opposed to him; and therefore I say, that in presenting the view which I am about to present to your Lordships, I of course am not to be taken as in any degree abandoning or qualifying what has been previously said by my learned friends. But I venture to go to this extent, that it is perfectly legal under this Act of Parliament for any ship-builder in this country to build a ship, adapted for war, under a contract with one of two belligerents and to equip that ship, so far as is necessary, to enable it to sail away from this country, and to deliver it to the belligerent either here or elsewhere in that unarmed state.

Now, first of all, what is the meaning of this section?—What is forbidden, is “equipping, furnishing, fitting out, and arming.” It is said, and it may be so, no doubt, that there is a difference between “arming” and “equipping, furnishing, and fitting out.” I have not heard from anybody that there is any difference between “equipping” and “furnishing and fitting out.”

*Mr. Baron Bramwell.*—No.

*Mr. Mellish.*—They seem to me to be all absolutely the same thing. But they all imply this (and I do not think that the Court will have much doubt upon that), an addition of something to a ship already built. I do not know that the Counsel for the Crown will contend for it, but I know that it is contended for by some persons, whose opinion may be very much respected, that the moment you put a plank down, if it is with a hostile intent, that would be within the statute. But that would be clearly to extend the words “equip, furnish, and fit out” beyond their plain and ordinary meaning. In their plain and ordinary meaning they clearly imply the adding something to a ship which, as far as the hull is concerned, is already constructed.

Now, that being so, the building of a ship is not forbidden by this statute; and the question is, Was it the intention of the Legislature, though they did not forbid the building of a ship in express and direct terms, by implication to make it unlawful? because it is obviously impossible to build a ship, or to sell a ship adapted for war to one of two belligerents, unless you are allowed

to equip it so far as to enable it to sail away. To say, "You, the ship-owners and ship-builders of this country, may sell a ship as much as you please, and you may build a ship as much as you please, on a contract with any one of two belligerents; but mind, you must put nothing on board of it which will enable it to sail away," is a perfect absurdity; and it does seem to me very extraordinary that if that was in the mind of the Legislature, and if it was the object of the Legislature to prevent any belligerent providing himself with ships in the ports of this country, they did not in plain terms say, "You shall not be allowed to build a ship, or to sell a ship to one of two belligerents."

Now, do the words of this section compel the Court to come to that conclusion? I say that they do not; for if you read them fairly and reasonably with a view to find out what is intended to be forbidden by them, they do not forbid every description of equipment, every description of furnishing, and every description of fitting out, but only that description of equipment, furnishing, and fitting out which tends to make the vessel a transport or store ship, or a ship to cruise or commit hostilities. It is not equipment as such, but equipment as a transport or store ship, or as a ship to cruise or commit hostilities, which is forbidden and made illegal by this Act. No doubt, when you ask what is the meaning of "equipping" a ship, you must first ask what is the description of the ship with reference to which you are talking. No doubt there are many descriptions of ships, and most descriptions of ships, in which arming would be no portion of the equipment. If you talked of "equipping" a whaler, you would think that harpoons were a necessary portion of the equipment of that ship. If you talked of equipping a transport, then putting a ship into that condition as to its cabins and so forth which would render it fit to sail as a transport, would be an essential part. Everybody knows that when, two years ago, it was necessary to send out in a hurry troops to America, or in the year 1854, when it was necessary to send large bodies of troops to the East, and the Government were taking up ships of every description, we all heard that they had to go into dock for a week or two in order to be fitted as transports. Even an ordinary ship could not be employed as a transport, unless very considerable additions to the fitting were made, and all such vessels went into dock for that purpose. Now I say that that is what is forbidden by this Act.

Now, my Lords, let us look once again at the words;—"If any person shall fit out and equip a ship or vessel with intent or in order that such ship or vessel shall be employed as a transport." Not merely "with intent," but "in order that." It is said that there is an "or." In numberless cases of Acts of Parliament where you find the word "or," one expression is meant to throw a light upon the other. There are the words "cruise or commit hostilities." I suppose that the words "or commit hostilities" are intended to throw a light upon "cruise," because an innocent cruising is distinguishable from "committing hostilities," and would not be within the Act. So when it is

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

said, "with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a transport or store ship, or with intent to cruize or commit hostilities," the act which is forbidden is an equipment, in order that the vessel may be used as a transport, or in order that the vessel may be used with intent to cruize or commit hostilities. The mere grammatical construction of the sentence is rendered very difficult, and, in fact, is rendered to a certain extent impossible, by the very odd insertion of the second words "with intent" before the words "to cruize or commit hostilities." The first words, "with intent or in order that," no doubt describe what the person who is forbidden to equip intends and actually does. I cannot help thinking that the second words, "with intent to cruize or commit hostilities," are simply put in opposition to the words "as a transport or store ship," and are only intended to describe the purpose for which the vessel is to be fitted or equipped; that it is to be as a transport or store ship, or with intent to cruize or commit hostilities, and that what is forbidden is the equipping and fitting out of a vessel so as to be adapted to cruize or commit hostilities.

Now that is very strongly corroborated by what has already been so fully pointed out to your Lordships, that beyond all question the actual mischief against which the statute was directed, the actual thing which caused the Legislature to pass this statute, was that a great number of persons were equipping ships to a very large extent, and rendering them fit to commit hostilities directly they left the ports of this country, and were hiring them as transports and store ships, fitting them out and embarking men on them, and setting sail on actual expeditions on a large scale from the ports of this country. That is the thing which it was mainly intended to prevent, and I apprehend that it was intended to prevent it, as has been already shown by the many citations which have been made to the Court, not so much for the benefit of one of the two belligerents, but because it was an absolute insult to the authority of the Crown in this country that anybody should be attempting to prepare warlike expeditions and warlike operations from the ports of this country, and that that was intended to be put an end to.

Then that is very strongly corroborated by the next section, namely, the 8th section. Beyond all possible question, that which is forbidden by the 8th section is the furnishing warlike equipment to a vessel which is already actually a war vessel in the service of one of the two belligerents, and which has come into the ports of this country. That in its terms is, beyond all question, confined to hostile equipment. If a man-of-war belonging to one of two belligerents comes into the ports of this country, having suffered sea damage, or having been engaged in an action with her enemy, having lost her masts, and with her ports broken in, it is perfectly lawful to repair all sea damage which that vessel has suffered, including, I apprehend, clearly the structure of the ship, though it may be a structure adapted to



ARGUMENT.

3rd Day.

warlike purposes. It is lawful to give her a new mast; it is lawful to repair her machinery; it is lawful to furnish her with provisions; it is lawful to furnish her with coals. It is not lawful to add to her armament; it is not lawful to furnish her with warlike stores; it is not lawful to furnish her with guns. If a ship in the perils of the seas had had her ports broken in, and had had her guns thrown overboard, you might, I apprehend, repair the ports, but you could not replace the guns. Now what we say is, that the 7th section is to be construed exactly as the 8th is, with this difference; the 8th applies to a ship already in the service of the enemy, and already equipped for warlike purposes; the 7th applies to a ship intended to be put into the service of the enemy, but not armed. And just as you may repair the sea damage and furnish all peaceful stores to a ship already in the service of a belligerent, so you may construct a ship altogether, and fit it up with all peaceful stores, which is intended to be in the service. And this shows, beyond all question, that the Act was not passed simply for the benefit of one of the two belligerents, and for preventing the other from obtaining assistance in the ports of this country. If I were asked at this moment what is most offensive to one of the two belligerents, and does them most harm, I should say the furnishing and selling of coals to those steamers which are roving about the waters. If the "Alabama" and the "Florida" could not buy coal from neutral nations, it would be simply impossible that they could go about at all. If you look simply to the assistance afforded to the belligerents, what difference is there between selling coal and selling gunpowder? The one is just as essential to enable the vessel to cruise as the other. What I have stated is the law in this country, we all know is the law now practically enforced in every other country. The "Florida" is at this moment repairing sea damage in the port of Brest.

*Lord Chief Baron.*—Do you imagine that we could sell gunpowder to an American vessel in one of our ports?

*Mr. Mellish.*—Not, I apprehend, to a ship which is already in the service of war. That, I apprehend, would be adding to a warlike force.

*Lord Chief Baron.*—That is adding to a warlike force.

*Mr. Baron Pigott.*—Do you think that you may substitute one gun for another of the same power?

*Mr. Mellish.*—That would not be illegal, except that I should rather suppose that we must look at things practically. I should have a very strong suspicion, when I found a man changing one gun for another, that the gun which he gave up was not so good as the one which he took.

*Mr. Baron Pigott.*—I by no means say that it is so, but that section in that respect may be a little doubtful; it is doubtfully worded.

*Lord Chief Baron.*—You observe that this is expressly "by  
8341. R

ARGUMENT.

3rd Day.

"adding to the number of guns, or by changing those on board for other guns."

*Mr. Baron Pigott.*—Or doing that by which the equipment is increased or augmented.

*Lord Chief Baron.*—"Any equipment for war," would that include gunpowder or shot?

*Mr. Mellish.*—Yes, my Lord; I presume that gunpowder or shot would be equipment for war.

*Mr. Baron Pigott.*—No doubt.

*Mr. Mellish.*—And therefore I say that it illustrates what I was putting to your Lordships as the difference between a war-like equipment and what I call peaceful equipments; and as it is perfectly lawful to furnish peaceful equipments to a ship already built, being a ship of war in the actual service of one of two belligerents, is it anything extraordinary to suppose that it was intended that it should be equally lawful to furnish peaceful equipments to a vessel which is intended to be in the service of one of two belligerents?

Now the great argument which has been pressed against us by my learned friend the Attorney General, and which has been referred to over and over again by the Court, and which I can see operates on the minds of your Lordships, is, that this construction will lead to such a very easy evasion of the Act. It is said that it is perfectly nugatory to make it illegal to put a war-like equipment on board in the ports of this country, because it can be so easily evaded by sailing out without the equipment, and then having another vessel following after with the equipment. Now, my Lords, the first remark which I would make on that point is, that notwithstanding all the discussion which has taken place, and the examination of what has actually taken place, I do not find that either before the Foreign Enlistment Act, or after the Foreign Enlistment Act, either in America or in England, this has ever been done. It appears that the "Alabama" sailed to the Azores, and took her armament on board in the port of another neutral country. I need hardly say that what takes place in the ports of another neutral country is nothing to us; but the stress of the argument, as I understand, on the other side is, that it would be so remarkably easy to bring this equipment out and put it on board on the high seas. Now I cannot help thinking (I may be wrong about this, and I do not pretend to speak as a person with any peculiar knowledge), that the reason why that has never been done is, that it is by no means so easy to do it as is supposed. Modern guns, I rather apprehend, are so very heavy that if you tried to bring them out and to put them on board another ship, you might wait for a month in the middle of the Atlantic before you could find a day on which you could do it, and certainly it is remarkable that the "Alabama" should have gone in an unarmed state the whole way to the Azores, running not only the risk of being taken on the passage, but running the risk that any law in the nature of a foreign enlistment law which might

exist at the Azores would be put in force against her, and that she would be prevented by the Government of that country from putting her guns on board there. It certainly strikes me that it may be the case that unless you get into some port, or at least some quiet roadstead where you are near the land, you practically cannot take your hostile equipment on board at all, and that that is the reason why it has not been done. You find the vessels in those American cases going partly equipped from the ports of the United States. You do not find them taking their armament on board on the high seas, but in the West Indies, or somewhere else; and this is a very material thing; because, unless this mode of evading the Act was so practical and so obvious that you must suppose that it was necessarily before the mind of the Legislature when it passed the Act of Parliament, the argument respecting the evasion comes absolutely to nothing. It must be remembered that at the time when the Foreign Enlistment Act was passed there were no ocean steamers,—there were some steamers going perhaps from Dover to Calais, and to Ireland, or something of that kind,—but there were actually no ocean steamers which one could have used to go over these seas; and in sailing vessels I apprehend that the transposition of the equipment would be still more difficult.

*Lord Chief Baron.*—With reference to assisting an actual belligerent ship in one of our ports, would it be consistent with this Act of Parliament, if a vessel came in (to borrow an expression which you will understand) almost a congeries of planks, being what the lawyers here call a total loss of a particular description,—a vessel not worth repairing, excepting that in war money, though the sinew of it, is not of much importance, and so the cost of repairing a vessel would be nothing,—would it be lawful, if a vessel were a mere wreck, to put her into a dock and repair her, and fit her out, and make her what she was when she left the United States?

*Mr. Mellish.*—Yes, my Lord, I should think so.

*Lord Chief Baron.*—You would say that, provided she could merely get into a port with her guns and ammunition in safety, she might be rebuilt?

*Mr. Mellish.*—Yes, my Lord; and I apprehend that she might take out the armament which she brought in, though she could not have a fresh armament; and that perhaps might be the reason why a man might repair his vessel instead of ordering a new one, because if he ordered a new one he could not transfer the armament to her; whereas if the old ship was repaired, then he might carry his armament away.

*Lord Chief Baron.*—Would not the doctrine of constructive total loss apply?

*Mr. Mellish.*—That I cannot say, my Lord. I am not aware that it ever has been applied.

*Lord Chief Baron.*—It is a very great pity that no cases have occurred within the last 40 years. We have to imagine a great variety of cases, and to consider them.

ARGUMENT.

3rd Day.

ARGUMENT.  
 —  
 3rd Day.  
 —

*Mr. Mellish.*—I say that you must look, in construing the statute, principally to what actually has been done. The Legislature do not give themselves the trouble, for the most part, to consider what never has happened; and I would submit that that would be an answer to the question which Mr. Baron Bramwell has put in one part of the argument, namely, "What would you say would be the rule of international law, if a ship were sent out without her armament, and then another ship came out with her armament; can you find any authority in international law upon that point?" The answer is, the thing has never happened, and the writers upon international law have for the most part looked to what has happened, and not to what may be possible to happen; and legislation goes on in that way; you pass your legislation with reference to what actually has happened and is before your eyes, and you do not apply yourselves to consider what possibly may happen; you wait till it actually takes place, and then if it is within the mischief, and the Legislature think it wrong, the Legislature pass a new Act. And I would say this, with reference to the doctrine of evasion: if it is a question between two constructions of the statute, and the only question is, whether you will extend it so far and no further, as will include something which is an evasion, and is within the mischief, and you can do that without including anything else which is outside the mischief, then it may be a reasonable argument, and the Court may be desirous to extend the construction so as to include a cause within the mischief. But if you find that you cannot extend the construction without carrying it a great way further, and without carrying it to matters which there is every reason to believe were not within the contemplation of the Legislature, and were not intended to be within it, then I say it is a wrong mode of construing a statute, and above all, a penal statute, because you are afraid that it may be evaded unless you extend it; to extend it so far as to include not only that which is an evasion of the statute, but that which there is every reason to believe the Legislature never intended to prevent. Here it is quite impossible to confine it. If you adopt the argument of the Attorney General, and say that every description of equipment with the intent is forbidden by the statute, you cannot confine the statute to a case where a vessel sails with a peaceful equipment, and another vessel comes after it with a hostile equipment. You must extend it to every case where a ship is being built or sold by a subject of this country to a belligerent. It would equally apply, although the contract was that a man should build the ship and run the blockade with it, and deliver it in a port of one of the two belligerents.

Therefore the real question which you must consider is, the question which I adverted to at the first, which has been so much argued, namely, was it really meant by this statute to forbid the building of a ship of war intended for one of two belligerents? That it is clearly lawful to do, according to every rule of international law.

My Lords, I believe that a great many passages have been cited, but there is one which, as far as I know, has not been cited; if it has been cited, it was cited when I was out of Court. It is in the third book of Vattel, chapter vii., section 110. I am citing it from Mr. Twiss's book on the Law of Nations, the second volume, at page 460. He says this:—"If a nation" (and then Mr. Twiss says, "by which Vattel means the domiciled subjects of "a nation") "trades in arms, timber for ship-building, ships, and "warlike stores, I cannot take it amiss that it sells such things "to my enemy, provided it does not refuse to sell them to me "also at a reasonable price." There he says, "If a nation trades "in ships, I cannot take it amiss that it sells such things to my "enemy, provided it does not refuse to sell them to me also at a "reasonable price. It carries on its trade without any design to "injure me; and by continuing it in the same manner as if I were "not engaged in war, it gives me no just cause of complaint." Now there is the distinction. If you simply build a ship ordered by one of two belligerents, fit it out so that it may sail away, and send it away, you are simply trading in the ordinary peaceful manner as if no hostilities were going on. If you fit out ships, engage mariners and marines, put arms on board, and equip them for immediate hostilities, and send them out in a fit state to commit hostilities, you are doing something which in times of peace nobody would think of doing at all. You are not carrying on a peaceful trade, but you are doing something which, if there was no war, you would not think of doing, and which, if you do, is an assistance to one of two belligerents. But if you simply sell a ship, and abstain from warlike equipment, and deliver it anywhere, I do not care where, either in a port of this country or in a port of the belligerent itself, you are simply carrying on a trade which is ordinarily carried on in peaceful times, and the belligerent has no right to say that, it being lawful by the law of your country, it is an injury to him. Then he goes on to say, "In what I have said above, it is supposed that my enemy "goes himself to the neutral country to make his purchases. Let "us discuss another case, that of neutral nations resorting to my "enemy's country for such purposes; it is certain that as they have "no part in my quarrel, and are under no obligation to renounce "their commerce for the sake of avoiding to supply my enemy "with the means of carrying on the war against me, should they "affect to refuse selling me a single article, while at the same time "they take pains to convey an abundant supply to my enemy, "with an evident intention to favour him, such partial conduct "would exclude them from the neutrality which they enjoy; "but if they only continue their customary trade, and do not "thereby declare themselves against my interest, they only "exercise a right which they are under no obligation to "sacrifice."

That being the rule, therefore, of international law, it being no offence of which the other belligerent is entitled to complain, that the subjects of this country sell their ships simply to one of

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

the two belligerents, and enable them to supply themselves with ships of war, provided that no armaments are fitted out, and that the ports of this country are not made hostile ports from which vessels can sail, is there any reasonable ground on the words of this section to suppose that it was the intention of the Legislature to make it illegal for the ship-builders of this country to carry on their ordinary trade of building ships as they carry it on in time of peace? If that is not contrary (as it is plain it is not contrary) to the rules of international law, surely the Court is not to strain this section for the purpose of carrying it beyond what any rules of international obligation make it necessary for this country to comply with. If the section may admit of both constructions (and surely it cannot be put higher than that), it is impossible to read this section without seeing that it admits of the construction for which I contend, if I do not put it higher than that.

*Lord Chief Baron.*—Can you make out that the language applies equally to either of the two things, and that therefore the criminal jurisprudence would be bound not to extend it, so as to make that a crime which before was lawful, beyond the clear meaning of the words of the Act? The question is, whether you can make that out.

*Mr. Mellish.*—My Lord, that depends upon this, whether the words, “as a transport or store ship, or with intent to cruise or “commit hostilities,” may not reasonably be taken as being governed to a great extent by “equip, furnish, or fit out,” so that they describe the particular equipment, furnishing, and fitting out which is intended by the statute.

My Lords, that is the view which I venture to take, and which I submit is the proper view of this statute; and that being the view, I think it can hardly be denied that this verdict was perfectly right and perfectly satisfactory; for I think I might say that there was no evidence at all (certainly there was no reasonable evidence) that there was any intention on the part of anybody to put a hostile equipment, and still less arms, on board the “*Alexandra*,” in the ports of this country. Looking at the facts, they render the matter so plain that nobody can have a doubt about it. The affair of the “*Alabama*” had already happened; everybody was alive to the Foreign Enlistment Act. The Government and their officers were alive to it; they had thought about stopping the “*Alabama*,” but had not done it. The American minister, the American consul, were alive to it. The agents of the Confederate Government were alive to it. Everybody knew that no vessel, of which the destination was at all doubtful, would be allowed to leave this country in an armed state. The officers of the Government in Liverpool, as everybody knew, were looking after the “*Alexandra*.” The agents of the American consul were known to be looking after the “*Alexandra*” every day; it was simply impossible to put any warlike equipment or any guns on board that vessel, without her being seized directly. Everybody knew it, and

everybody agreed, that if the hostile intent and destination was proved, if the guns were put on board, it would be a case within the Act. There was a doubt, as there is a doubt whether a peaceful equipment was within the Act. But can it be doubted for one moment, when all that had happened in the case of the "Alabama" was in the mind of everybody, and had just happened, and when you find no hostile equipment on board, and that according to the evidence they had carefully avoided putting not only guns, but the preparation for guns on board,—can anybody doubt that they purposely avoided putting any hostile equipment or any guns on board? In fact, that was practically admitted in the reply of my learned friend the Attorney General; and if our construction of this Act of Parliament be right, and if it be correct that the only equipment which is made illegal by this statute is a hostile equipment, no one, as I submit, can doubt that this verdict was perfectly satisfactory. It was left to the jury what the intention was,—it was left to them what the actual equipment was, and no one can doubt that if our construction be right, namely, that a hostile equipment was necessary to bring the case within the statute, this verdict was quite right.

ARGUMENT.

3rd Day.

My Lords, there is only one other point to which I wish to call the attention of the Court, and that is a point which I believe has not yet been mentioned. I submit to your Lordships that this is not a case in which the Court can grant a new trial upon the ground that the verdict is against the weight of the evidence, or on any other ground except that there has been a positive misdirection. I should submit that the mere ground of the verdict being against the weight of the evidence, or the mere ground that it is unsatisfactory, or the mere ground that there was an omission to direct the jury, is not a ground upon which any new trial can be granted; but that a new trial can only be granted upon the ground that there has been a positive misdirection.

My Lords, the rule, as I apprehend it, is clearly this: If you have an entirely civil proceeding—civil in form, and civil in substance—the Court can grant a new trial, either on the ground of misdirection, or on the ground of the verdict being against the weight of the evidence. If you have an entirely criminal proceeding—criminal in form and criminal in substance—the Court can grant no new trial at all, either on the ground of the verdict being against the weight of the evidence, or on the ground of misdirection. But if you have a proceeding which is in form civil, but in substance penal, the Court can grant a new trial, not on the ground of the verdict being against the evidence, but on the ground only of misdirection.

My Lords, that is laid down in the case of *Brook v. Middleton*, which is in 10th East's Reports, page 268; it was a *Qui tam* action for offences against the Usury Act. The marginal note is, "The Court will not grant a new trial in a penal action where the verdict has passed for the defendant on the ground of its

ARGUMENT.  
 3rd Day.

"being against "the evidence." A rule *nisi* was moved for, and the Court were not satisfied that they had authority by precedent, "in a penal action where a verdict had been found for the defendant without any alleged misdirection of the Judge in point of law (as in *Wilson v. Rastall*, 4 Term Reports, 753), to grant a new trial; and they ordered the matter to stand over, to give them an opportunity of looking into the precedents, Lord Ellenborough, Chief Justice, saying that if the Court did not find themselves precluded from entertaining the motion on the ground of the verdict being against the evidence, they would hear Garrow further upon it. And before the Court rose on this day, his Lordship referred to the case of *Fonnereau v. —*," which is reported in 3rd Wilson, page 59, "where the Court said that the rule had been laid down for 50 years past not to grant new trials in actions on penal laws where the verdict was for the defendant. There, indeed, the doctrine was laid down rather too generally, as the Court would certainly grant a new trial in case of the misdirection of the Judge in point of law; but in case of a verdict against evidence, the rule was now settled that no new trial would be granted, which was sufficient to dispose of the present motion."

My Lords, there is another case, namely, the case of *Hall v. Green*.

*Mr. Baron Bramwell*.—Is that more recent?

*Mr. Mellish*.—It is not a very recent case.

*Mr. Baron Bramwell*.—Ten years ago?

*Mr. Mellish*.—1853. It is reported in 23rd Law Journal, (Magistrates' Cases), page 15; it is also reported in 9th Exchequer Reports, page 247. I am citing from the Law Journal, because I think that the observations of the Judges are a little fuller there. It was an action for penalties, under the 25th of George II., for having public music and dancing without a licence. Mr. Montagu Chambers "moved for a new trial, on the ground of misdirection, and also of the verdict being against the evidence." He says, "The learned Judge misdirected the jury in leading them to suppose that the question was, whether the keeping the rooms as an hotel was the principal or the incidental purpose." I remark upon that, because it is something of the same objection which is made here. He says, "This tended to mislead the jury; it is unimportant that the company frequenting the room is respectable," and so forth. *Parke Baron*.—I do not think it matters which purpose was principal and which accessory. The Judge ultimately directed the jury rightly in desiring them to consider whether it was kept for both purposes. There was therefore no misdirection; and in a penal action no new trial will be granted on the ground of the verdict being against the evidence." Then Mr. Montagu Chambers says, "That is the old law;" and then Parke Baron says, "It is not the worse on that account." And then Baron Parke, in giving judgment, says, "The fact of the verdict being against the evidence is no ground for a new trial



" in a penal action. That is the old law, and there is no ground for overruling it." And Baron Alderson says, " There is no misdirection in this case. The jury, in answer to the Judge, found that the room was kept for purposes of entertainment only. That in my opinion was a wrong verdict, but we cannot set it aside on that ground. If an improper verdict of Not Guilty is found in felonies and misdemeanors, the Courts do not set it aside, holding it to be better that the guilty should escape, than that the matter should be tried over again. And this is a salutary rule."

*Mr. Baron Bramwell.*—I am sure that I can mention that that was a very strong case, for how the jury came to find a verdict for the defendant (I was counsel in the case) I cannot understand.

*Mr. Mellish.*—Was your Lordship counsel for the defendant?

*Mr. Baron Bramwell.*—Yes, I was for the defendant.

*Mr. Mellish.*—My Lords, there is another case, which perhaps I ought to mention, because there is something which it may be said is the other way, and I wish to bring this point fairly before the Court.

*Mr. Baron Bramwell.*—In the case of *Hall v. Green*, you may really take it that it was about as strong a case of the refusal of the Court to grant a new trial where the verdict was against evidence as it is possible to be. I can state that of my own knowledge.

*Mr. Mellish.*—My Lords, there is the case of *Robinson Qui tam* against Lequesne, which is in Bunbury's Reports, page 253. " Upon an information of seizure of jesuits' bark on the stat. 14<sup>o</sup> Car. 2. cap. 11, sect. 12, for fraudulent exportation of jesuits' bark, two casks out of six being dust. There was a verdict for the defendant, and now a motion was made for a new trial; but *per totam curiam* it was denied." Then it is said, " *Nota.* It seemed to be admitted in a case of this nature a new trial might be granted if the fact would have admitted of it; and the counsel for the plaintiff were prepared with precedents (if they had been called for) to that purpose." That is the only kind of authority which I find at all the other way. And that is not an authority, it is merely a note. The Court would not grant a new trial, but there is a note which is the only authority that I can find at all the other way.

Now, my Lords, can any real distinction be drawn between an ordinary *Qui tam* action and such a proceeding as this? This is in its form a civil proceeding; so is a *Qui tam* action in form a civil proceeding. Can it be said that this is not a proceeding of a penal nature?

*Mr. Baron Pigott.*—The claimant gets his costs from the Crown here, I suppose?

*Mr. Mellish.*—I believe he does, my Lord, under some modern Act; he would not get them at the time when the Foreign Enlistment Act was passed.

ARGUMENT.

3rd Day.

*Mr. Baron Pigott.*—And so the defendant does in *Qui tam* actions.

*Mr. Mellish.*—Yes, my Lord.

*Mr. Baron Pigott.*—Therefore it makes no distinction.

*Mr. Mellish.*—You get your costs under a modern Act ; at the time when the Foreign Enlistment Act was passed you would not get them.

*Mr. Baron Pigott.*—That was not the reason evidently, because in a *Qui tam* action the party had his costs.

*Mr. Mellish.*—My Lords, I would simply say, Can any real distinction be drawn ; is not this quite as much a penal proceeding as a *Qui tam* action would be ?

*Lord Chief Baron.*—It is a forfeiture resulting from the commission of a crime ; that is what the case is. If a crime has not been committed, there is no forfeiture. The Act expressly says that the party shall be guilty of a misdemeanor, and be liable to fine and imprisonment, and the ship shall be forfeited. If there be no crime committed no ship is forfeited.

*Mr. Mellish.*—The only ground on which I can see that it can be put is that it may be said, as Mr. Baron Bramwell said in one part of these proceedings, that it was a voluntary act on the part of the claimant coming in, and so that he is not in the nature of a defendant. I confess that, if I may be allowed to say so, it seems to me about as voluntary as if a man put a pistol to your head and asked you to deliver your purse, and you delivered your purse voluntarily to him. Here the Crown commences the proceeding by seizing your ship.

*Lord Chief Baron.*—On the ground that you have committed a crime.

*Mr. Mellish.*—And you come in and claim it.

*Lord Chief Baron.*—You come in and say that you are innocent.

*Mr. Baron Bramwell.*—I think that, in defence of my expression, I may be permitted to say that the case is more like this, that the man having got your purse, holds a pistol to your head if you intend to take it back from him ; you would be something of a volunteer then if you went and attacked him.

*Mr. Mellish.*—The law does not give a man the power of taking my purse from me, but the law does give the Crown the power of taking my ship from me, and I cannot resist it ; the law gives me no means to resist it ; it would be an illegal act, however innocent I was, if I resisted the Crown when they came and took it. Therefore the Crown take it, and this is a proceeding by which a party recovers it ; and if it be, as Baron Alderson says, a most salutary rule that the guilty should escape rather than that the subject should be oppressed by trying the same question over and over again, surely it would apply to a proceeding of this nature quite as much as to any other. Surely it cannot be urged that it is any objection that here the Crown is the party proceeding ; it can hardly be said that the Crown has a prerogative to have a new trial on the ground of the

verdict being against the weight of the evidence which the subject would not have. On the contrary, it is more necessary that the law of the land should be adhered to which prevents a new trial, the object of which is to prevent a person being vexed over and over again by proceedings of this kind after he has got the verdict of the jury for him in matters which are in their nature of a criminal and of a penal description.

ARGUMENT.

3rd Day.

*Mr. Baron Channell.*—In a case in 11th Meeson and Welsby, if it is worth while to look at it, it is said, "The Court has authority to and will grant a new trial in a penal action, though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands."

*Mr. Mellish.*—I think it will hardly be said that the jury would take the law in this case into their own hands.

*Mr. Baron Channell.*—It is in reference to that part of the matter as to which it may be argued that though the Lord Chief Baron's direction was not strictly incorrect, the jury may have misapprehended the effect of it.

*Mr. Mellish.*—Will your Lordship be kind enough to mention the name of the case to which you have referred?

*Mr. Baron Channell.*—It is the case of the Attorney General *v. Rogers*, in 11th Meeson and Welsby, page 670.

*Mr. Mellish.*—Did the Court there grant a new trial?

*Mr. Baron Channell.*—No, I do not say that they did. You have been citing authorities from a digest; this is a subsequent digest.

*Mr. Baron Pigott.*—Is it quite certain that in *Qui tam* actions the defendant gets his costs if he succeeds?

*Mr. Mellish.*—He did not get his costs at the time of the passing of the Foreign Enlistment Act, it is only by a subsequent Act.

*Mr. Baron Channell.*—Although the rule may be right as you state it, the question is whether the Court can grant a new trial where there has been no actual misdirection, but where the jury may have misapprehended what the Judge has said.

*Mr. Mellish.*—I am not aware of any case. It is for your Lordships to consider the point. I only throw it out.

*Mr. Kemplay.*—If my learned friend, Mr. Mellish, felt it necessary to apologize for rising to show cause against the rule after my learned friends who had preceded him, I am sure your Lordships will feel with me that I ought to apologize for rising after he has addressed the Court, because it is exceedingly difficult to pick up anything after he has dealt with the subject in hand; and certainly it would be impossible to express anything more clearly and intelligibly than he has done. But in a matter of so much importance I do feel that I should like to address to the Court one or two observations upon the construction of the 7th section of the Act, which seem to me to have a very strong

ARGUMENT.  
 3rd Day.

tendency to support the view which he has already pressed upon the Court.

The position taken by the Attorney General in moving this rule is distinctly this, that unless your Lordships deviate from the plain words of the Act, you must say that any species of equipment, any species of fitting out, with or without arms, (provided it is done with the intent that the vessel shall be employed in the service of a foreign state), is struck at by the Act. That would be, I submit, such an unreasonable—I was going to say such an absurd—result that I am quite sure your Lordships will not adopt it, if there is another construction which the section will admit of. Just look at what it would lead to. Supposing there is in this country a merchant vessel fitted in every respect as a merchant vessel, but of such strength as to be capable of being easily turned into a vessel of war; and supposing a person here, a friend of the Confederates, purchases that ship with the intention of taking it out of the country and converting it into a ship of war, but that the vessel requires an anchor; can it be pretended for one moment that if anybody supplies that vessel with an anchor in order to enable it to depart from this country, and somewhere else to be converted into a ship of war, that is an offence intended to be prohibited by this section? I might quote other cases, but that is sufficient for the purpose of illustrating that which I wish to present to the Court. I think the Court will not put that construction upon it if there is another reasonable construction to be put upon it. The construction I put upon it is this,—and I call the attention of the Court to the section for a moment, to see how fully the words of the section bear it out,—I say, the “equipping, furnishing, fitting out, or arming” that is spoken of in the 7th section must be of that distinctive kind which is requisite to make the ship a ship of the kind alluded to, either a transport or a store-ship, or a ship to cruise and commit hostilities. Before I turn to the words of the 7th section, I will ask the Court to suppose that the words “with intent,” where they occur secondly in that section, are omitted. I may ask that, because I have no doubt my learned friends on the other side will say it is the same in effect as if they were out; and it is exceedingly probable that they have been introduced incautiously, because if you look at the corresponding section of the Foreign Enlistment Act of the United States, you will see that they do not there occur; the words there are;—“equip or be concerned in equipping” any ship or vessel with intent that such ship or vessel shall be “employed in the service” of so and so, “to cruise or commit hostilities;” and I think it is very probable that when this section was adopted to a certain extent for our Act, and it was intended to introduce the provision as to a transport and store ship, and the alternative “or” had to be introduced, that the words “with intent” were put in incautiously. The seventh section, then, in effect would be this: “If any person within Her Majesty’s dominions shall equip,” &c. “any ship or vessel

"with intent or in order that such ship or vessel shall be employed in the service of any foreign state" "as a transport or store ship; or to cruize or commit hostilities;" or in effect it would be this, "to be employed as a transport or store ship, or "cruizer, or privateer, or vessel of war against a state with whom "we are at peace." That, I submit, would be the grammatical and true meaning of the section; and what I say is this, that the equipment referred to here must be of that distinctive character which has reference to the particular purpose to which the vessel is to be applied. Your Lordships must not lose sight of the purpose for which it is to be used. I am not speaking of the criminal intent, but looking at the purpose, the result. And it is a great mistake to suppose that the whole turns upon the intent with which the act is done. I utterly deny that that is the view you are to take of this section. The intent prohibited here is no doubt a material question; it is absolutely material; but you must not allow the glare of that to blind your eyes from seeing what the thing itself is which the Act prohibits to be done; and in order to ascertain that I submit you must look to the purpose for which the vessel is to be applied.

With those preliminary remarks, let me come to the section itself. And first of all with regard to the words "equip, "furnish, fit out, or arm," the three first words, viz. "equip, "furnish," and "fit out," it seems to be conceded all substantially mean the same thing. Now, "equipping" a privateer certainly, I think, in the common meaning of the expression would include "arming." I think there can be no doubt about that but; it was necessary to add the words "or arm" for this reason, that a vessel might be perfect, in every respect, as a vessel of war, short of arming; there might not be any fittings required to make that vessel complete except the arming, and therefore it was necessary to have the words "or arm," because if they had not been there then the vessel might have been said not to have been "fitted out," but "armed" merely, and I conceive that is the reason why those words are introduced.

Now, let me carry your Lordships to the words of the Act as to the purpose to which it is to be applied;—"with intent "or in order." I do not think there is much difference between those two expressions, but if anything, the second expression seems, as has been already pointed out by my learned friend, Mr. Karlake, to point to the purpose to which the vessel is to be employed. "With intent or in order" to do what? Is it with the intent or in order that the ship may be afterwards converted into a ship of war?—No. It is "with intent that such ship or vessel shall be employed in the service of a foreign state." Now what is the meaning of "*such* ship or vessel?" I contend that it means such vessel so equipped, so furnished, so fitted out. It has reference to the *status* of the ship, as produced by that furnishing, fitting out, or equipping—"with intent or in order that "*such* ship or vessel shall be employed;" then come the words, "in the service of." Now I do not think it is unimportant to

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

attend to those words, "in the service of." It is not "by" the foreign Government, but it is to meet the very case that was to be provided against, namely, fitting out privateers in neutral territories to be employed in the service of a foreign state with whom the Government is at peace. Then we come to these words—"in the service of a foreign state," and so on, "as a transport or store ship," or, as I have already submitted to the Court, a cruizer or vessel of war; and what the Act points to is, the producing of that which is in a condition to cruize and commit hostilities, and the perview and intention of the Act was to meet that case, and that case alone. It is a mistake to suppose that it was intended to meet the case of those particular contraband things, soldiers and ships of war. It was nothing of the kind; it was not intended to prohibit, and it does not in effect prohibit, the building of ships of war; it only prohibits its being done with intent to be employed in the way pointed at in the section; because it is conceded that you may build a vessel of war; that you may build it armed at all points, and sell it to one or other of the belligerents. Therefore it was not intended to prohibit our doing that, or to prevent contraband of that description leaving this country and going to one or other of the belligerents. The object of the statute, so far as foreign enlisting goes, is exclusively to secure the allegiance of the natural-born subjects of the Crown. It is not confined to times of war, it is equally applicable to times of peace, and it is equally applicable to a case of this kind, viz., soldiers enlisting, for instance,—to take a familiar case,—in the service, say, of the Sultan, during the time of the war with Russia, though the soldiers would have been enlisted to fight on the same side as ourselves; therefore, so far as foreign enlistment is concerned, it is to maintain the allegiance of the natural-born subjects of the Crown, and to prevent their being interfered with directly or indirectly. Then as regards the equipment of vessels, I submit that it is to prevent the ports of this kingdom being made military stations, in effect, for one or other of the belligerent powers, which would be a breach of the use of a neutral territory which no nation ought or would be justified in submitting to. If it might be done by one, it might equally be done by the other, but it would be impossible to allow it to be done without its leading to a collision of forces in the neutral territory. It is to prevent the belligerents having the benefit of the neutral territory to use it in that particular way.

Before I sit down let me add one word as to the case which, no doubt, will be very much relied upon, the case of the *United States v. Quincy*, which has been alluded to several times. It is very remarkable that the American Act varies from ours in the wording of it; and it seems to me that it might very well be that in the construction of that Act it would be necessary to adopt the view adopted in the case of the *United States against Quincy*. The 3rd section of the American Act provides that "if any person shall fit out and arm, or attempt to fit out

"and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming." It is quite clear, therefore, that the former part of that section, using the conjunctive "fit out *and* arm," seems to put a meaning upon "fitting out," which would not include "arming." The section itself coupling the two and saying "and arm," puts upon "fitting out" a meaning that might be supposed not to include arming. It is a fitting out independently of arming, otherwise there would have been no necessity to have added "and arming." Therefore, when you come to the next clause of that section, "or shall knowingly be concerned in the furnishing, fitting out, or arming," it might well be that the Courts of the United States would be bound to put that distinctive meaning. But it does not at all follow that that is necessary in construing our Enlistment Act, because the words are there disjunctive from the beginning, "equip, furnish, fit out, or arm." And I have already suggested to your Lordships the reason of the addition of the words "or arm" to meet a case where everything else was done short of arming.

ARGUMENT.

3rd Day.

*Mr. Baron Channell.*—If I understand the indictment in this case which you have cited of *Quincy* in 6th Peters, that was an indictment on the last branch of the statute, which charged him with being concerned in the fitting out. There the word "or" was advisedly substituted for the word "and," to be found in the other instances. We have the word "or" in every case in the present Act.

*Mr. Kemplay.*—Yes, my Lord. What I am suggesting to the Court is that the peculiar construction of the American Act might render it necessary to put a distinction between warlike equipment and innocent equipment: it may not be necessary, nor, as I submit, is it necessary, in our case to do so; but if you look at the purpose for which the vessel is to be employed, and you then apply the words "equip, furnish, fit out, or arm," with reference to that purpose, provided the thing is done for that purpose, then it becomes illegal if done with the intent that that purpose should be carried out and the act of any person aiding and assisting in that purpose, however far he may fall short of accomplishing the purpose, if it is done with that intent, if it is done in attempting to accomplish that purpose, provided it includes the purpose, would be contrary to the Act, but it must be something that has reference to that ultimate purpose. Suppose the case of workmen who are working upon a ship, fitting out the ship, it would scarcely be contended that they had anything to do with the ultimate purpose of its being employed; but if you can make out that they are knowingly aiding and assisting with the intent that it shall come to that result, namely, that it shall come to the result of being a vessel fit to cruise and commit hostilities, then they might be guilty equally with other people.

Now, my Lord, I was intending to say something upon the intent, but I do not think I should be justified in doing so after

ARGUMENT.

3rd Day.

the arguments which have been already addressed to the Court upon that point. But one word as to the evasion of the Act. I conceive that in order that a thing may be said to be an evasion of an Act, that is, in the sense that it would be a substantial infringement of the Act, there must be something in what is done that is expressly prohibited; it is not enough if it is something that might possibly have been provided for if it had been foreseen, but it must contain in itself something of that which is prohibited. Now I will give a familiar illustration to explain what I mean. If a vessel of one of the belligerents takes its station in neutral waters for the purpose of being ready to pounce upon a vessel of the other belligerent, and availing itself of that advantage does so, that is a breach of our neutral territory, and that is something that we should complain of, and justly complain of. Other instances might be put of a similar kind. But suppose I make a domestic rule in my house that no servant shall in my house wear a particular dress, say a dress of a particular colour; and suppose my servant employs herself in making a dress of that particular colour, but never intends to use it in my house, never intends to infringe what I have prohibited, but gets a holiday, and then puts the dress on outside my house, not inside, how can you say that that is an evasion of the law which I have established? It is not; because how can you tell that I have any objection to my servant wearing the dress outside? All I have done is to say it shall not be worn inside; you must have in the thing that is done something of the element of that which is itself prohibited. Now, is there anything in the case, say, of the "Alabama"—

*Mr. Baron Bramwell.*—Suppose you promulgate your law to your servant with a preamble that the wearing of a silk dress by your servants was very injurious to them, inasmuch as it necessitated their spending more money than they could honestly earn, and you prohibited the wearing of silk dresses by your servants while in your employ; and suppose one of your servants were to put on a silk dress directly she got out of doors, and were to say, Mind I have got a holiday, and I am not in your employ.

*Mr. Kemplay.*—I should hardly agree with your Lordship that she was not still in my employment. I think that would be begging the question. I do not put that case. I should say she is still in my employment.

*Mr. Baron Bramwell.*—You would say she was still in your service, though she was at a tea garden and enjoying herself?

*Mr. Kemplay.*—Certainly. That would contain in it the element of that which I had prohibited, and I might charge her with having done the thing prohibited, and give that in evidence that she had done so.

These are all the observations that I think myself justified in troubling your Lordships with, and I think I ought again to apologize for having done so, but in a case of so much importance I thought it desirable to present them to you.

[The Court adjourned for a short time.]



*Mr. Mellish.*—My Lords, before the Attorney General commences his address, I should like to call the attention of the Court to a printed copy of the decree made by the Judge of the Admiralty Court at Nassau with respect to the "Oreto," which has been sent to me by Sir Hugh Cairns.\* It appears that she was seized on the ground that the captain of her attempted to equip, furnish, and fit out the ship with intent that she should be employed in the service of the Confederate States. The Judge says, "To support the libel it is necessary that proof should be given,—1st. That the aforesaid parties, having charge of the 'Oreto' while the vessel was within the jurisdiction of the Vice Admiralty Court of the Bahamas, attempted to equip, furnish, and fit her out as a vessel of war. 2ndly. That such attempt was made with the intent that she should be employed in the service of the Confederate States of America, and, 3rdly. That such service was to cruise and commit hostilities against the citizens of the United States of America. Witnesses have accordingly been produced to prove that the 'Oreto' is constructed for and fitted as a war vessel, that acts have been done in her, since she came to Nassau, which constitute an attempt to equip, fit, and arm her as a vessel of war. That from certain conversations which were overheard between the master of the vessel and a person who came out passenger in her, and from certain acts done by this person, there is proof that she was intended for the service of the Confederate States of America, and to cruise against the citizens of the United States. It has been contended by the Proctor for the Respondents, that proof ought also to have been given, that Her Majesty the Queen was at peace with the United States of America, as the Court cannot take judicial notice of that fact." Then he goes on to say that "the Court is bound to take judicial notice of Her Majesty's proclamations, and that in the proclamation of the 13th of May 1862 the Confederate States of America are named, and it is also alleged that Her Majesty is at peace with the United States of America, and that as the allegation in the libel, that there was no licence from Her Majesty to fit the 'Oreto' as a vessel of war, has not been traversed, the Court has a right to assume that it is admitted. A responsive plea has been put in by the defendants:—1st. Denying that there was any agent of the owners, or persons interested in the 'Oreto,' of the name of John Lowe, on board of her, as affirmed in the libel; that the said Lowe was merely a passenger, and never exercised any power or control over the vessel. 2ndly. Denying that James Alexander Duguid, the captain, or any person exercising authority over the said steam-ship, attempted to equip, furnish, or fit out the said ship, with intent that she should be employed in the service of the Confederate States of America, to cruise and commit hostilities against the citizens of the United States.

\* Vide Appendix, page iv.

Argument.

3rd Day.

“ 3rdly. That while the ‘Oreto’ lay in the river Mersey, immediately previous to her sailing for this port, British men-of-war frequently passed and re-passed her, and that she was at all times in a conspicuous and public position, without having been seized or arrested, or subjected to detention, and that she quitted Liverpool in the open day, without any manner of haste or secrecy; that the master, while she was so lying in the Mersey waiting instructions from the owner, directed the mate to employ the crew during their leisure hours in doing ordinary ship’s work, fitting gear, strapping blocks, &c., during which time, as well as after she sailed, certain spare blocks which were then on board, and which were intended solely for the use of the ship, as part and parcel of her rigging, and not in any way whatever as blocks for gun tackles, or as part of the furniture of guns, were strapped by the said crew, and the said blocks were never known as or called gun tackle blocks until a certain Edward Jones, a man of infamous and abandoned character, who had been shipped on board in the capacity of boatswain, called them gun tackle blocks. That neither the said Alexander Duguid, nor any person whatsoever having authority over the said steam ship during the time she was at the port of Nassau, ever gave any orders or directions to strap blocks as gun tackle blocks, or to strap any blocks whatever. But any blocks which may have been strapped on board the said ship were done by the seamen of the ‘Oreto,’ in their ordinary avocations, and is always done on board merchant ships, in order that they might have employment on board, and not for the purpose of fitting the ‘Oreto’ as a vessel of war. 4thly. That no faith or credit ought to be given to the depositions of Charles Ward, a witness of the party proponent, that he is a man of abandoned character, and is actuated by malicious and vindictive feelings against the said James Alexander Duguid, and has sworn falsely for the purpose of carrying out an avowed intention of doing an injury to the said J. A. Duguid. On the evidence given in support of this plea I shall remark as I proceed. The evidence which has been produced in support of the prosecution may be classed into two parts. 1st. That which relates to circumstances which occurred *before* the vessel arrived within the jurisdiction of the Admiralty Court of this colony. 2ndly. That which applies to facts done *subsequently* to such arrival. To the first division belong the construction and fitting of the vessel before she left England, the flags and other materials which she had on board when she sailed, and the conversations or remarks of the parties in charge of her while on her passage from England. To the second division belong the proceedings on board the vessel after her arrival within the jurisdiction of the Bahamas Vice Admiralty Court. From the evidence appertaining to the first division, I abstract the following, which is all that I think in any degree material.” Then it states the evidence of the chief mate, Mr. Duggau, who

says, "The number of men, all told, on board was 52 or 53. I believe that was an ordinary crew. We had not too many. We had no cargo. The 'Oreto' was fitted (when she left England) as she is now. All vessels are not fitted alike. I have seen some ships fitted, with regard to bolts, in ports, as she is. I have seen vessels intended to carry cargo fitted as she is. Some of Green's and Wigram's ships are so fitted. There was a passenger on board whose name was Lowe. He did not, to my knowledge, exercise any authority over the ship. In the *cross-examination* Mr. Duggau says, 'I had access to every part of the 'Oreto.' 'I have gone right through the vessel. I have never seen any im-  
 "plements of war or any ammunition on board of her.' Then there was a seaman of the name of Porter, who 'deposes that  
 "the vessel had no stowage room for cargo. She was not fitted as merchant vessels usually are. She had a magazine. He says, I believe there were shell rooms; was in a room  
 "where shells were stowed. She had light rooms; they are not usual in merchant vessels. She had boxes for shot. She had  
 "two gigs, a life-boat, pinnace and dingey. I took her to be a gun-boat. We had a passenger named Lowe on board. As far  
 "as I could see, Mr. Lowe had a little authority on board; on one of the mess-kids being broken, I heard Mr. Lowe say to  
 "Captain Duguid, he ought to take better care of the things. Mr. Lowe has given me different orders, and told me to steer  
 "different courses when I was at the helm.' Then there is a fireman of the 'Oreto,' named Irving, who states, 'I have  
 "served on board steam ships before. I have been so serving six or seven years. The 'Oreto' was not fitted like steam  
 "ships I have been serving in before; they were merchant ships and passenger vessels. I did not see any cargo on board  
 "the 'Oreto.' There were shot and shell boxes, and a place which the crew called a magazine. I know a flag they call  
 "the Confederate flag. I saw one on board the 'Oreto'; I saw it on the quarter deck before we came in here; I saw  
 "it among other flags. There was an American and a French flag.' Then he gives evidence with reference to the passenger named Lowe. Then there was evidence given on the other  
 "side by Captain Duguid, who denied some conversations which had been imputed to him. Then there is some evidence as to  
 "some shells having been put on board and taken from on board; but I cannot occupy your Lordships' time by reading  
 "through the examinations. There is a great deal of evidence about putting on board some blocks. Then the witness says:—  
 "The strapping of the blocks now alone remains to be con- sidered. While the vessel lay at Cochrane's Anchorage, straps  
 "were put on some blocks which had been brought in her from England. The blocks so strapped might be used as gun  
 "tackle blocks, but blocks so strapped might also be used for the ordinary purposes of a merchant ship.' What proof is  
 "there, then, that they were to be used as gun tackle? 1st, it

ARGUMENT.

3rd Day.

" is contended, because they were named gun-tackle blocks in an entry in the ship's log book, and were so called by some of the crew ; 2ndly, because there were more of them than could be required for the ordinary use of the ship as luff tackle or watch tackle ; and then it is argued, if the blocks were intended as gun-tackle blocks, the 'Oreto' having been constructed as a war vessel, it is to be inferred that they were intended for her equipment. The other side in reply contend, 1st, that as the tackle might be used for either of the purposes before mentioned, the mere circumstance of the mate in his entry in the log book, or some of the crew not knowing for what they were really intended, choosing to call them gun-tackle blocks, is no proof whatever that the owners of the vessel intended to use them as such ; 2ndly, that the evidence of Captains Parke, Raisbeck, Waters, and Eustace, all master mariners and men of much experience, has proved that the number of blocks on board the 'Oreto' is not at all greater than would be required for the ordinary purposes of the ship, especially as she is a new vessel, on board of which a greater number of spare blocks is usually provided than is to be found in vessels that have been in use. That Captain Duguid unequivocally states in his evidence that the blocks were solely for the ordinary use of the vessel, and were never intended to be used as gun-tackle blocks. That he never ordered them to be strapped as such, or heard them called so until he heard the evidence given in Court." Then he goes on to say, "Comparing, then, the evidence on the one side with that on the other, I agree in the opinion that the mere fact of blocks which might be used for other purposes being *called* gun-tackle blocks by persons who did not know for what purpose they were intended, is not proof that they were intended to be used as gun-tackle blocks. I think that as the fact of there being more blocks on board the 'Oreto' than were required for her use, is a matter of professional opinion ; and as the opinion of several master mariners, quite competent to form a correct one, has been given in evidence, that there were *not* more blocks on board the vessel than might be required for ordinary use, I ought not, in the absence of any valid and producible reason for so doing, to adopt the opinion of one party in preference to that of the other. The consequence of which is that the fact of there being more blocks than could be required for the ordinary use of the vessel is not sufficiently proved." So that I understand the learned Judge to have decided that the putting of those blocks on board, unless they were gun-tackle blocks, was not a sufficient equipment within the statute.

*Mr. Attorney General.*—Read on.

*Mr. Mellish.*—"Lastly, I see no evidence to invalidate the direct and positive testimony of Captain Duguid, that the blocks were *not* intended to be used as gun-tackle blocks. If there is not enough proof that the blocks in question were intended to be used as gun-tackle blocks, any observation as

"to the probability, arising from the construction of the ship, that they were for her equipment becomes unnecessary;" by which I understand the learned Judge to mean that whatever else might have been proved, that is the only fitting on board the "Oreto" which took place in his jurisdiction, which was confined to the Bahamas. That whatever else was proved it would not be a hostile equipment, and therefore would not be within the statute. "If the evidence given to prove that any act has been done here subjecting the vessel to the penalties of the Foreign Enlistment Act is not sufficient for that purpose, it is, perhaps, superfluous to say anything about the capacity of the vessel to take cargo or her connexion with the Southern States of America." Then he goes into a further part of the case to inquire whether the ship itself was a ship of war; but his first ground, as I understand it, is, that there is not sufficient equipment within the jurisdiction of that Court, because the only equipment that took place was putting on board those blocks, and those were not gun-tackle blocks. He says, "Perhaps it would be superfluous to consider anything more." But he does go on to consider it, and says, "I will however observe, that although the ship may not be calculated to carry the ordinary bulky cargo of merchant vessels, yet there are certain kinds of cargo of which she might carry a considerable quantity. For example, there were some hundreds of boxes of shells put on board of her, and those were stowed in a compartment called the shell room. There yet remained what is called the magazine, the light rooms, and other places, besides the cabin. Into these a very large number of muskets, sabres, pistols, and other warlike stores and ammunition might be stowed; and it is not improbable that a fast vessel of this description might be used for what is called 'running the blockade,' an employment which, however improper in itself, would not subject the vessel to forfeiture here." He goes on to say he is not satisfied that the vessel was intended to cruise or commit hostilities; that she might only have been intended for the purpose of running the blockade, which would not subject her to forfeiture under the Enlistment Act. But he says, as I understand him, it is necessary in order to prove an equipment within the jurisdiction of the Vice-Admiralty Court, the putting of guns on board or things to be used for those guns.

*Mr. Baron Channell.*—What was the decision?

*Mr. Mellish.*—The ship was let go; she went to a Confederate port, and goes now on the seas under the name of the "Florida."

*Mr. Baron Pigott.*—Who was the Judge?

*Mr. Mellish.*—His Honour John Campbell Lees, Judge of the Vice-Admiralty Court of the Bahamas.

*Mr. Attorney General.*—It now becomes my duty to address your Lordships on behalf the Crown, and certainly I think you will be of opinion that the importance of this case has not been exaggerated by my learned friends on the other side. They have most justly and properly occupied a very considerable portion

ARGUMENT.

3rd Day.

of your Lordships' time in opening their case, and it will, of course, be my duty also to trespass at some length upon your Lordships' time. I hope it may not be necessary to do so quite at the same length as those who have preceded me, but I am sure that at whatever length it may be necessary for me to trouble your Lordships, I shall meet with your Lordships' indulgence.

I will first take the argument of my learned friend Sir Hugh Cairns, and state to your Lordships what I have put down as the different heads of that argument. First, he says, and I cannot but think that there were traces of conscious weakness in his mode of arranging the argument, that the probable object of the statute is to be determined *a priori* by the rules of international law. Usually, my Lords, we approach the question of the construction of a statute by a careful examination of its language and of its provisions. If there were a desire to warp the minds of a Court and to withdraw the minds of the Judges from the language of the provisions of the statute, I could imagine no better method of conducting the argument than, in the first instance, to enter into able and ingenious *a priori* disquisitions as to what may be the probable object of a statute of that description, to refer to some other test than the ordinary test of legal construction, and then to go into its history; for that was my learned friend's next point, after laying down the probable object; secondly, he says, the history of American and English legislation on the subject confirms this view. And when speaking of the history of that legislation, my learned friend also took a very unusually wide and discursive scope of argument. It is not very common, I think, in courts of law to hear Parliamentary debates ransacked, and the speeches of this and that statesman addressed to a deliberative assembly either when a bill was introduced or under discussion at other times referred to, for the purpose of laying down rules *a priori*, as to what were the objects of the statute, and to what rules of interpretation it is to be squared and accommodated; that also was a course and order of argument to my mind strongly indicative of conscious weakness. But then my learned friend came, thirdly, to the provisions of the statute itself. Your Lordships will, of course, hear from me in due time of the many different interpretations of that statute, which upon this and upon the former occasion the counsel for the claimants have advanced. At present I confine myself to what I understand to be the result of Sir Hugh Cairns' argument upon that point. According to him, the provisions of the statute rightly interpreted confirm the view which he has advanced; they do not reach any case of a ship built within the realm for whatever purpose, with whatever intent, if her equipments, so far as they are completed or are meant to be completed within the realm, are *ancipitis usus*, and not of a distinctively warlike character. That I understand to be my learned friend Sir Hugh Cairns' proposition on the construction of the statute. Then his fourth proposition was with reference to authority. He

reviewed the authorities in America, which he considered to go to the same point, and he referred to the absence of authorities in England as negatively tending the same way. Then he justified the ruling of the Lord Chief Baron, and of course the verdict of the jury.

ARGUMENT.

3rd Day.

Now I propose, my Lords, to meet that argument, and necessarily, in order to do it as I should desire, I must follow the order in which it was presented, though I have already told your Lordships I do not think it the legitimate order in which to examine a question of this description; for I apprehend, if within the four corners of the statute you get the means of a proper interpretation, you have nothing to do with all those extraneous matters on which my learned friend Sir Hugh Cairns endeavoured to base the whole or a main part of his argument. Still, my Lord, as I must not assume that within the four corners of the statute there may not be that which introduces all or some part of those considerations, and as I know I have to deal with an antagonist of the utmost ability, whose ability was never perhaps more displayed in the discharge of his duty than on this occasion, I, of course, will pay that deference to his argument which is due to it, and I will endeavour to follow it in the order in which it was stated.

Now, in the first place, he did that of which I, of course, cannot for a moment complain. He referred to language which I myself had used in moving for this rule, as expressing at that time what had occurred to me as the purpose and object of the statute. I will not read to your Lordships all the passage which he read from the print of my speech, which is at pages 52 and 53 of that print; one part will be enough for the purpose I have in view. I said, "It is plain that the object was to preserve the neutrality of this country, and to enforce it against the subjects of this country in matters in which the neglect of it by those subjects, or the violation of it here by foreign belligerent Governments, was thought calculated to lead to a position as regards foreign nations which would endanger the peace and welfare of the kingdom." Your Lordships will perceive I refer there to the language of the preamble, and found my view of the language of the preamble upon that which is within the statute itself. My learned friend did not, as I understand him, quarrel materially with that statement, but he interpreted it in a manner which I find no foundation for in the statement itself, and which certainly I must respectfully dissent from, for the purpose of laying a foundation for the argument which he intended to advance upon that first branch of his case. He said in substance, It means therefore this, that the object was to enforce the performance of international duties; then he went on to say, that therefore international rules would be found to be, probably, the key to our municipal legislation on this subject, and to prescribe its limits. Not only, my Lords, is no such doctrine to be found in the passage my learned friend has cited from my speech in this Court, but it is a doctrine against

ARGUMENT.

3rd Day.

which I have had occasion most strongly to protest in a speech which I made elsewhere ; and though I feel deeply the honour paid to me in referring to anything which has fallen from me elsewhere, yet I cannot help thinking that it would have been better, and somewhat more consonant with the usual way in which cases of this kind are discussed, if anything said to a totally different assembly, and for a totally different purpose by me, whether right or wrong, had not been referred to in the course of this argument ; but since it has been referred to, and since it has been imputed to me, if not here, certainly elsewhere, that there was some inconsistency between what I said in March and the duty I am discharging now, I take the liberty to say there was no such inconsistency, and that any one who endeavoured with any degree of care to understand the words which I addressed to that other assembly (I acknowledge I was not worthy that such care should be bestowed on my words, but those who refer to them ought to endeavour to understand them), any one who did endeavour to read those words, feebly spoken as they might be in defence of the honour and dignity of my country, in another place, would see that the whole argument of that speech was to establish the directly contradictory proposition to that of my learned friend Sir Hugh Cairns on this occasion, and to say that the Foreign Enlistment Act was a mere matter of municipal law ; that it was not the exponent and expression of any antecedent international obligations which we owed to any other foreign Government ; that a foreign Government had a right to expect from us the enforcement of that Act, but only as a municipal Act, and not upon international principles ; and that the same authority which enacted it might, if it was thought wise and fit, abolish and repeal it, and that no foreign Government whatever would have a right to complain if it did ; that what the Foreign Enlistment Act prohibited was not, according to antecedent rules of international law, a subject of complaint as between Government and Government recognized by those established rules, however likely it might be to become a subject of complaint owing to the varying circumstances of political affairs in different countries. That might be a right or a wrong proposition. I shall show your Lordships, from authorities which I shall cite, that that was a true and correct proposition, according to some of the best American writers, and according to decisions in their courts ; but certainly that is a proposition diametrically contrary to the fundamental proposition of my learned friend's argument, who says you are to square the interpretation of this statute by what he assumes to have been the prior obligations of this country to foreign belligerent powers. I say there were no such obligations, and that it is a total misinterpretation of international law to say that there was any state in the world which, according to the settled and established principles of international law, could have required this country to prohibit those things which were prohibited by that statute. I may be right or wrong in



that, but certainly I am not inconsistent. I may also say here, in order that I may not be obliged to advert again to a subject to which I advert at all unwillingly, that anyone who reads my speech will find that in it, rightly or wrongly, it was stated to be the opinion of the advisers of the Crown that the "Alabama" had offended against this Act of Parliament, and should and would have been detained had she not prematurely escaped. And further, there was that which might be exceedingly superfluous, and not at all to the purpose; there was a statement of opinion which the speaker at all events entertained of the conduct of those merchants who made themselves parties to such acts in violation of the law of their own country, calculated, if not to involve the British Government in hostile relations, at least to disturb the amicable intercourse between this country and other powers. Therefore I am not doing that which I hope no man in my position ever would do—endeavouring to obtain a decree of forfeiture against a subject upon grounds of law which are not honestly and sincerely believed to be just and sufficient by the Government bringing forward those grounds. Most fallible those who entertain that opinion may be—your Lordships are the judges of that. The question is one undoubtedly very far from being free from difficulty, of which we are well aware; but most assuredly we have not been guilty,—I have not been guilty in the position in which I stand, nor was my predecessor,—of an act so unworthy, I venture to say, of the office we fill, as to bring forward a case of this description, except on grounds which we ourselves believed to be sufficient.

Now, my Lords, I will go to an examination of those rules of international law which my learned friend proposed to use as a guide to the interpretation of this statute. Certainly I think it will be found that they lead us a very small way, if at all, for that purpose. He said we may disembarass the case of the rules applicable to the conduct of Governments, looking to those which are applicable to the conduct of neutral subjects in war. You were referred to well-known doctrines laid down, not always in identical terms, by different international writers, as to the right of the subjects of a neutral state during a war to carry on a trade in contraband articles with either or both of the belligerents; that, he said, was one principle; that there was such a right; that ships are like other things contraband of war, and that the general right to carry on a trade in those things, subject to the conflicting right of the belligerent to take and intercept them, was settled by international writers. I understand that he meant to say we must approach the interpretation of this statute with the hypothesis that it was probably not intended to interfere with that right. Then, he said, on the other hand, there was a second rule, namely, the rule which provides for the inviolability of the neutral territory by any proximate or immediate act of war on the part of a belligerent, or of the subjects of the neutral state instigated by a belligerent. He illustrated that by very well known authorities and well settled principles,

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

mentioning the case of the "Twee Gebroeders" in 3d Robinson; namely, that it would be quite wrong for two cruisers to engage each other in neutral waters; that it would be equally wrong when an action was commenced beyond neutral waters to prosecute it by chasing into neutral waters; that it would be equally wrong to lie in wait and commence operations from neutral waters; and therefore that inviolability of the neutral territory from immediate or proximate acts of war was the second principle; and the corollary drawn from that was, that certain rules might be expected to be laid down as applicable to ships of this kind. In passing, I will just observe, that my learned friend, when he referred to the case of the "Twee Gebroeders," and mentioned those examples of possible violations of neutral territory by belligerents, expressed some surprise at an observation made by me in the course of moving for this rule, viz., that I did not imagine it had occurred to any person that the prevention of a hostile collision in British waters between two ships, which two belligerents might be at the same time fitting out in either the same port or in two neighbouring British ports, was one of the mischiefs that the statute was intended to guard against; and my learned friend thought I had overlooked the authorities he refers to. Indeed, my Lords, I not only did not overlook those authorities, but it was the very recollection of that doctrine which prompted the observation I then made to the Court. International law perfectly well settles that rule; and if any belligerent power should violate the neutral territory, international law provides a remedy, and the belligerent would by the force of the insulted neutral be compelled to make restitution and adequate reparation; and those rights being perfectly established, and being enforced, according to international law, with the highest and most sufficient sanctions,—the sanctions of war and reprisals against the offending belligerent power,—it was perfectly unnecessary to legislate with a view to prevent that which was really sufficiently guarded against by the existing international law. And I repeat, my Lords, but with profound respect to any one who may be under a different impression, that though I have endeavoured to refer to all the authorities I could meet with, both as to the history of this statute and of the American statute, I have never anywhere met with any suggestion, till the summing up in this case, that one of the things particularly meant to be provided against by the Foreign Enlistment Act, either here or in the United States, was such a violation of neutral territory as that which I have been just describing; and I think it very plain that, this rule being well established, those very things which the Foreign Enlistment Acts do, upon any interpretation which may be put upon them, prohibit, would be done, if they were done at all, consistently with an adherence to that rule of international law. It never, of course, would be supposed by any belligerent that if he might build ships, if he might buy ships, if he might equip ships within the neutral territory, he was therefore to be at

liberty to use them hostilely within the same territory. Certainly the case was not one which was left unprovided for by international law, and I do not think it will be found that there is anywhere the least trace of an idea that to meet such an evil as that specifically, not to say singly or mainly, legislation was necessary. Now, my learned friend having referred to those two rules of international law, proceeded to deduce from them his own corollary; and in order to do him justice, perhaps, it might be as well that I should refer to what he said upon that point in his own language. It is at pages 79 and 80 of this report. He said, "What would be the conclusion which we naturally should draw from these rules as to the course which municipal legislation might be expected to take?" Then, after speaking of the definition of the line outside the dominions of a state, and of the three-mile rule, he proceeds: "Then we find that, according to the rules of international law, it is allowable to a neutral state, and to the subjects of a neutral state, to carry and to deliver outside that line, or inside it, any of those articles which are called contraband of war, guns, ammunition, ships, or any other article which may be supposed. International law also holds that you might bring a ship to the outside of that boundary wherever it is drawn; that you might carry from the neutral state guns and ammunition, and warlike supplies of every kind, and deliver them into the ship outside the boundary, subject to the right of capture; the other belligerent, if so disposed and so able, might intercept the supplies, might capture the ship, and might seize the articles as contraband; but subject to that, the act might be done without any offence against the principles of international law. But then, on the other hand, international law says you must not originate on the neutral territory any proximate act of war; you must not issue out of the neutral territory with a ship which shall be prepared to commit hostilities." And a little afterwards, at page 82, he goes on to say: "The belligerent would say to the neutral power, 'Now we must have an understanding about this; you say that your neutral territory is to be inviolate, I agree to that. I have no right to go inside your territory and cut out a ship which I see arming and preparing there to commit hostilities. I cannot violate your territory. If I went into one of your harbours to do that you would object to it, and would prevent it, and in an international point of view I could not claim a right to do it.' But then the belligerent would say: 'You on your part must take care that what passes out of your territory shall pass out in such a state as that I shall have a fair chance of capturing or dealing (if I am entitled to capture or to deal with it) with that which comes outside your territory without its having occupied itself within your territory by preparing itself for aggression upon me, so that when it comes out of your territory it shall not come out as a ship which I have to

ARGUMENT.

3rd Day.

“ ‘cope with as a ship of war, but as an article of property  
 “ ‘ which might, if it could escape my watchful care, find its way  
 “ into the port or the possession of another belligerent, but as to  
 “ which I, in my turn, have a right to the chance of capturing it  
 “ ‘ and taking it before it could commence hostilities against  
 “ ‘ me.’ That would be a very natural course for a belligerent  
 “ to take, and very natural language for a belligerent to hold,  
 “ and it is language, the sense and wisdom of which it is impos-  
 “ sible to dispute. Therefore, my Lords, I should say, *à priori*,  
 “ that what we should expect to be the course of municipal  
 “ legislation upon the subject would be some legislation which  
 “ would guard against that evil which I have endeavoured to  
 “ point out, and which, by way of restraint upon the subjects of  
 “ the neutral power, would prevent its subjects doing that of  
 “ which, in the language that I have endeavoured to convey, the  
 “ belligerent might complain.”

Now, my Lords, that is extremely ingenious, but absolutely without foundation on the principles of international law. I have no doubt it is perfectly true, the belligerent would practically complain whenever he was suffering danger or damage from operations of that kind against which the Foreign Enlistment Act is directed, if they were carried on under the observation of the Government openly in a neutral country. But as to those fine distinctions about the boundary line, and about its not being permissible by international law to carry a ship up to the boundary line from the neutral territory in such a state that the moment she crosses it she may be in a condition to commit hostilities; as to the chance of capturing it or dealing with it; and the right which the other belligerent has to require that the neutral should send the ship over the line in such a state that she may be captured or dealt with without being able to defend herself, it is purely an imagination of my learned friend's mind. I understand why his imagination took that direction, because he wanted to invent a rule of international law to square with his theory of the Act, and at the same time to take off the edge of some practical arguments against his general conclusion. But I have a very short answer to that, and that is, that it is as plainly justifiable (putting municipal law aside) by international law to deliver a contraband article, or a congeries of contraband articles, in the neutral territory itself, within the neutral waters, as it is on any part of the line outside. And not only do I say that as a general proposition, but I am able to illustrate it with regard to this particular matter of an armed ship. My Lords, the American authorities that your Lordships will hear of, if you have not heard of them already, and other authorities too, all say that, municipal legislation apart, a ship completely armed and equipped may be sold within the neutral territory, and that the belligerent has no right by any settled rule or principle of international law to complain of it. For the purpose of this distinction of my learned friend, what difference in the world is there between a ship

constructed here and a ship sold here? Why, suppose a ship ready made, made merely as a mercantile speculation by the builder, that I believe is a case not touched in any way by the Foreign Enlistment Act; whether it be or not is not the present question. But putting the Foreign Enlistment Act and municipal legislation out of the question, if this rule of international law which my learned friend Sir Hugh Cairns invented for the purpose of his argument in order to make the two things fit together, existed, it is perfectly plain that no ship ready armed and equipped could be delivered within the neutral waters so that she might pass out ready for action if she met the enemy on the sea without giving a right of reclamation to the foreign Government. Is that the doctrine of American writers? I will refer your Lordships to a short passage in Wheaton's History of the Law of Nations, New York, first edition, page 312, in which he treats the proposition as one only to be spoken of with contempt. He is there speaking of a controversy between two Italian jurists, Lampredi and Galiani. One of them, Lampredi, he regards as a person of some reputation and learning, while Galiani, the other, is a person whom he thinks very lightly of indeed. I believe we find this very point touched there. "Lampredi then proceeds to consider an idle question raised by Galiani, 'whether the conventional law of nations, interdicting the trade with the enemy in articles contraband of war, extends to the sale of the same articles within the neutral territory?' Galiani pretends that it does, and that a ship, for example, built and armed for war in a neutral port, cannot be there lawfully sold to a belligerent. Lampredi takes a great deal of superfluous pains to fortify, both by reason, and an appeal to the authority of treaties and of preceding public Jurists, his own opinion that the transportation to the enemy of contraband articles alone is prohibited; but that the sale of such articles within the territory of the neutral country is perfectly lawful; he admits that there may be instances where neutral nations, from a prudent desire of avoiding any collision with powerful belligerents, may have prohibited the trade in contraband of war within the territory; but he asserts that Venice was the only example, during the war of the American revolution, of a neutral state absolutely prohibiting such a traffic. Naples only prohibiting the building, for sale, of vessels of war, and the exportation of other contraband articles; whilst Tuscany permitted her subjects to continue their accustomed trade in such articles, both within the territory and for exportation; subject, in the latter case, to the belligerent right of seizing contraband goods going for the enemy's use."

Now, my Lords, nobody can read that passage without seeing very plainly what Wheaton's view of this distinction would be. It is quite plain that it can make no difference whatever for the purpose of the distinction whether a ship ready made is sold or whether she is manufactured and delivered under an order. So

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

far as that goes, and before we come to the Foreign Enlistment Act and its construction, I entirely subscribe to something which fell from the learned Lord Chief Baron at the trial, that it could make no difference whether there was a sale of a thing ready made without a previous contract or a delivery under a contract. No doubt if no legislation made a difference there would be none. And most assuredly, as far as the right of foreign belligerent countries to complain is concerned, it is perfectly plain that if they cannot complain of a ship ready armed and equipped being sold and delivered in a neutral port, and crossing the frontier water ready immediately to engage with any ship she may meet, of course I do not mean going in pursuit, because that falls under another consideration; if, I say, foreign belligerent countries could not complain of that, neither could they complain because the ship is constructed under circumstances like those which we have been considering, and crosses in a condition to resist any attempt to make a capture of her. But the truth is that there is no connexion whatever between my learned friend's premises on this part of the case and his conclusion. His two rules of international law, properly understood, are quite sound as far as they go, but they do not conduct you to the conclusion that there is an obligation antecedently to municipal legislation upon any neutral country to prohibit that part of the trade of its subjects which, whatever construction you may put upon this Act, is prohibited by the Foreign Enlistment Act.

And I venture to say that it will be a deep and most serious misfortune to this country, and to all other countries in a similar position, if such a doctrine should at any time receive the sanction of your Lordships' authority, because what would of course be the immediate consequence? Why, that whenever ships prepared for war have actually crossed the frontier and have not been stopped under such circumstances, some colour would be given to those demands which have hitherto been treated as extravagant, unreasonable, and utterly without foundation in the doctrines of international law, for compensation and reparation for all the damage which ships so crossing the frontier line might commit.

I pass, my Lords, from that, and before I present my own view of the mischief of the statute, and consider what is the true connexion, as far as there is any, between questions of international law and that statute, I think it will be convenient that I should shortly refer to his Lordship's ruling, upon the corresponding point, because this argument of my learned friend Sir Hugh Cairns appears to me certainly to have that support, which I am very far indeed from undervaluing, which any argument may have that coincides, to a certain extent, with passages in a judgment or charge of a learned Judge. It is one of the things, my Lords, of which we respectfully complain in this summing up and ruling of the Lord Chief Baron; that his Lordship has made arbitrary assumptions as to the connexion between the general permission of contraband trade by international law and

the construction of this statute with respect to ships. And I will ask your Lordships to permit me to refer you to the passages of that charge which contain those assumptions. There is one, my Lords, at page 229, which I will not dwell upon. It merely states the general rule as to the right of trade in contraband, adopting, I think, from Chancellor Kent, that passage, to the effect not only that no nation is bound to prohibit commercial adventures in contraband of war, but I think also the one in which he uses the expression open to criticism that the right of a neutral to transport, and of a hostile power to seize, are conflicting rights. His Lordship refers to those authorities, upon which I make at present no observation. But then at page 231 he takes up the same subject again, and after noticing that the word "building" did not occur in the Act of Parliament, which is of course a very important observation, and one which will require careful attention when we come to that part of the subject, his Lordship proceeds thus: "Surely if from Birmingham either state may get any quantity of destructive instruments of war, and if from the various parts of the kingdom where gunpowder is made they can obtain any quantity of that destructive material, why should they not get ships? Why should ships alone be themselves contraband?" My Lords, we all entirely agree that ships are not alone contraband. The expression "contraband," properly speaking, relates to that which by international law may be taken upon the seas. All those things are contraband there; and it appears to me that, as far as international law is concerned, there is no distinction whatever between ships and those other things. But if the learned Lord Chief Baron meant to use the word "contraband" when he said "why should they not get ships?" "why should ships alone be of themselves contraband?" in the sense of "prohibited by the statute," (I suppose that was the sense in which the word was used,) then I would take leave to say, that is a matter of legislation; and that as far as we find that ships are so, we are not to endeavour to get out of it, and to pare down and fritter away the statute by arbitrary and false constructions, because it may seem (though I think very good reasons can be given for the distinction) that one kind of contraband should be put upon the same footing as another.

How does his Lordship proceed?—"Now, gentlemen, I will state to you why I put the question I did to the Attorney General. I said, Do you mean to say that a man cannot make a vessel, intending to sell it to either of the belligerent powers that require to have it, to that one which will give him the largest price for it? Is that unlawful? The learned Attorney General, I own, rather to my surprise, declined giving an answer to a question which I thought very plain and very clear. You" (that is the jury) "saw what passed. I must leave you to judge whether there was anything improper in the manner in which I (so to express it) communed with the Attorney General on the law, so that we

Assumpt.

3rd Day.

ARGUMENT.

3rd Day.

" might really understand each other, and that I might have my mind instructed, fitted out, equipped, and furnished, if you please, by the contents of his. Gentlemen, the learned Attorney General declined to answer that question. But I think, by this time, having read to you these matters," (that is, the passages from the American books concerning the general rules as to contraband trade), " you are lawyers enough to answer it yourselves. I think that answer ought to be, ' Yes, a man may make a vessel.' Nay, more, according to the authority I have just read " (that was, I think, the case of the " *Independencia* ") " he may make a vessel and arm it, and then offer it for sale." Well, my Lords, I believe that to be perfectly true, provided always that it was not done with any intention antecedently to the offering for sale such as the statute strikes at. At all events it is true by general international law. Then his Lordship says: " So Story lays down. But I meant, gentlemen, as I said then, if I had got an affirmative answer to that question, to put another. If any man may build a vessel for the purpose of offering it to either of the belligerent powers who is minded to have it, may he not execute an order for it?" That would apparently refer to a vessel not only built but armed. His Lordship goes on to say, " Because it seems to me to follow as a matter of course, if I may make a vessel, and then say to the United States, ' I have got a capital vessel, it can easily be turned into a ship of war; of course I have not made it a ship of war at present; will you buy it?' if that is perfectly lawful."

*Mr. Baron Channell.*—" If that is lawful?"

*Mr. Attorney General.*—" Surely it is lawful for the United States to say, ' Make us a vessel of such and such description, " and when you have made it send it to us.' " Now, my Lords, I take the liberty of saying that the *sequitur* is not obvious to my mind; it may be a true interpretation.

*Lord Chief Baron.*—I must rather object to a critical observation of anything that is not a direction to the jury, that you have a right to complain of. This is really the first time that I have ever heard a learned Judge's direction to the jury used in this way after being taken down in no doubt tolerably accurate short-hand, but it contains some rather considerable mistakes and corrections. Although certainly it is generally praiseworthy, yet there are many parts of it which are open to serious objections. Therefore, except in the matter of direction to the jury, if you think it useful to comment upon it, I have no objection; but it is not usual in this Court to make a short-hand writer's note the subject of that species of commentary.

*Mr. Attorney General.*—I regret it, my Lord, if my duty should require me to do anything unusual, but I am perfectly convinced that the jury would naturally receive, however unintentional on your Lordship's part, impressions from many of those passages to which I wish to call attention.



*Lord Chief Baron.*—If you think it necessary, you can, of course, do so. ARGUMENT.

*Mr. Attorney General.*—My Lord, I think it absolutely necessary. 3rd Day.

*Lord Chief Baron.*—Then I should be very sorry to stop you, because I believe it is entirely owing to myself, as presiding in this Court, that that we are now doing is permitted to be done; that is, to take a regular short-hand writer's note for this purpose. In the times of those who preceded me, and as long as Lord Wenleysdale was a member of this Court, such a thing was not permitted. I think there is considerable convenience in the modern practice, which I believe we have adopted from what I consider to be the better practice of the Court of Equity, namely, that of resorting to a short-hand writer's notes for the very words that were used. But most unquestionably this line of argument would not have been permitted, if my brother Parke, now Lord Wenleysdale, had been sitting in the Court. There are many reasons why I may be considered in some measure as having introduced the practice, and certainly I do not mean to complain of it, if you think it necessary to the justice of the case to resort to it now.

*Mr. Attorney General.*—Certainly, with all respect to your Lordship, I do.

*Lord Chief Baron.*—Then I have no more to say.

*Mr. Attorney General.*—My learned friends on the other side have referred to the shorthand notes, and to parts of your Lordship's summing up, as well as the rest. No doubt we shall know eventually, and of course we shall take it with entire deference, what your Lordship really meant by any passages that may have been misunderstood in any quarter; but the jury by those passages would have been led to receive impressions, and to suppose themselves to have been instructed in a certain sense of the statute.

*Lord Chief Baron.*—Pray understand me as saying distinctly, that as the practice was introduced by myself, I certainly mean to throw no impediment in the way of the fullest use that can be made of it, for the advancement of justice.

*Mr. Attorney General.* My Lords, I wish to state this. (I am sure your Lordship would not suppose the contrary for a moment.) I have not the slightest wish to decline to receive from your Lordship any correction as to any error which there may be in the Report. On the contrary, I should be exceedingly obliged if you would tell me if there be any expressions in the Report, upon which I speak, which appear to your Lordship to be inaccurately stated there, through those defects which we all know may creep into all shorthand notes. I am sure I should be sorry to make an observation upon anything of that kind; but my impression is, that in substance, the passage I am about to read was what I heard from your Lordship myself, and what was actually said, namely, that it follows that because a party may sell a vessel which it was said may be sold, even armed, according to the

ARGUMENT.

3rd Day.

authority of Story, so he may even execute an order given by one of the belligerent parties for a similar vessel. And then follows this passage, "Now the learned counsel certainly addressed themselves very much to this view of the matter; but it was said, 'But if you allow this you repeal the statute.' Gentlemen, I think nothing of the kind. What that statute meant to provide for was, I own, I think, by no means the protection of the belligerent powers." There, my Lords, with perfect respect, I take the liberty of saying that I most fully agree. I think that upon the face of the statute it was perfectly plain that it was the peace and welfare of this realm that the statute was meant to provide for, and no person can take exception to that. "I do not think their protection entered into the heads of those who framed this statute, otherwise they would have said, you shall not sell gunpowder, you shall not sell guns."

*Lord Chief Baron.*—We have, in the next sentence, "very heartily," but "heavily" is, no doubt, the correct meaning.

*Mr. Attorney General.*—I am reading from the small book, because I have marked it. "There are places that now and then explode in different parts of the kingdom, and which would have complained very heavily if they had said, You shall not sell gunpowder, you shall not sell arms. Why all Birmingham would have been in arms. But the object of this statute was this." I have no doubt what follows was merely by way of illustration. At the same time, it is an illustration which seems to me to have had the unfortunate effect of representing as if it were a complete view of the object of the statute that which, to say the least, would be a view only of some incidental inconvenience which the statute might help to meet. His Lordship says, "The object of the statute was this: we will not have our ports in this country subject to possibly hostile movements; you shall not be fitting up at one dock a vessel equipped and ready, not being completely armed, but ready to go to sea, and at another dock close by be fitting up another vessel, and equipping it in the same way, which might come into hostile communication immediately, possibly before they left the port. It would be very wrong if they did so, but it is a possibility. Now and then it has happened, and that has been the occasion of this statute."

*Lord Chief Baron.*—There is an error there, because it is quite plain from the summing up that that was not the occasion of the statute; it was one of the occasions which might give rise to it.

*Mr. Attorney General.*—I have no doubt whatever, my Lord, that that was your Lordship's intention, but nobody could read the passage, as I have already said, without being satisfied that although your Lordship would not desire to be understood as laying down in those terms your view of the whole scope and object of the statute, nevertheless, unfortunately it was so expressed to the jury, or expressed in a manner amounting to that, and it would certainly, I think, produce the impression even upon the minds of those who would not misunderstand your Lordship to a great

extent, that your Lordship thought the only object of the statute was to prevent within British waters those acts which may be called direct, or, as my learned friend calls them, proximate acts of hostility; that such acts as are in truth hostile collisions or movements leading to hostile collisions shortly and at a slight distance from our territories, so that you may say the attack began within our waters. But, my Lord, I take the liberty of observing that the whole tendency of the passage which I have read is a misleading tendency, suggesting this, that there is no reason in the world why ships should be in a different position from other contraband; and in point of fact his Lordship must have been understood to say, I do not think they are: I think the statute was only meant to prevent hostile operations of ships, or that which might lead to hostile operations of ships within our waters, and to prevent that species of breach of the peace—to prevent that which would be a breach of the peace, or a violation of our territory by hostile operations; and it had not any such large intent and object as would justify a distinction being made by legislative enactment between the position of ships generally, and the position of other contraband.

My Lord, I venture to think that this was an erroneous and a misleading view with respect to the object of the statute and I will now take the liberty of presenting my view of the object of the statute, derived mainly from the language of the preamble and from the provisions of the statute itself. Now I take first the preamble, and I find that the preamble expresses the mischief which was to be prevented thus. It speaks both of the "enlistment or engagement of His Majesty's subjects to "serve in war," and of the equipping and fitting out and arming of vessels "for warlike operations in or against the dominions "or territories of any foreign prince," or "against the ships, "goods, or merchandise of any foreign prince," or his subjects, "as prejudicial to" and tending "to endanger the peace and "welfare of this kingdom." And I find that the statute follows out that preamble, in the second clause, by prohibiting the enlistment in any part of the world in the service of any foreign prince, without His Majesty's licence, or on board any ship "intended to be used for any warlike purpose" (I take one expression, which is sufficient for me) "of any natural-born "subject of the Crown." The latter part of the same section also prohibits the hiring or procuring by any person whatever, whether natural-born subject or not, within the realm, of any other person, whether a natural-born subject or not, to act as an officer, soldier, or sailor in the land or sea service of any foreign prince, or to agree to go to or embark from any part of the dominions of the Crown of England in order to be so employed elsewhere.

So that when we take the subject of enlistment, we find it is perfectly plain upon the face of the statute that there are no proximate acts of war, whether within our own territory or which could tend to the violation of our territory, which

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

are alone aimed at ; but, on the contrary, the net is thrown as wide as the entire world, and the statute deals with enlistments by natural-born British subjects anywhere, and it deals also with the procuring in the realm of any persons whatever not only to enlist, but to agree to go or embark from any part of His Majesty's dominions with the purpose to engage themselves or enlist elsewhere.

Then, my Lord, the same Act contains the clauses we have to consider upon the subject of the equipment of vessels. I say, that upon the face of the preamble and clauses taken together, a mischief, as large as words could describe, is pointed at as not sufficiently prevented by existing laws, namely, a danger to the peace and welfare of this kingdom ; and the clauses which follow prove that that is a danger which it is supposed may arise from acts of the subjects of the Crown not only within British territory, but beyond British territory, as to one at least of the two matters with which the Act deals. It is, therefore, quite impossible to circumscribe within any such narrow limits as has been imagined the general object and the general policy of the Act.

Now let me state to your Lordships what I think is the just conclusion to be drawn from the Act itself, with all such reference to extrinsic facts of history as may be admissible as to its object. I understand the fact to be this, that the Act was considered necessary in order to enable the Sovereign of this country to take the measures which were or might be useful to preserve the peace of the kingdom and to avoid entanglements with foreign powers. It was not because foreign powers had by established international law a right to demand it ; but because we knew, in the affairs of men, that the demands of foreign powers, and the differences which might arise with them, were not limited by abstract *a priori* notions of absolute right. It was to avoid entanglements and difficulties of that sort that the Crown asserted its unquestionable right to compel, in those matters which this Statute defines, under penalties, the observance by its own subjects and by foreigners within the realm, of that neutrality which the Sovereign himself desired to observe.

And, my Lords, it is very plain what sort of evils would arise if these prohibited things were allowed to go on. Is it not in itself manifest that enlistments of men and equipments of ships within the realm might tend to foment those wars as to which the Sovereign was neutral ? And that they might tend by fomenting those wars to introduce complications and difficulties which otherwise might not arise ?

In truth, my Lords, experience has shown with regard to both these subject matters, the enlistments of men and arms, and the equipments of vessels, that these things are liable to happen when there are large bodies of people within the State not so neutrally disposed as the Sovereign, when feeling, opinion, or whatever else may be the cause, leads to strong sympathies within the realm on the part of numbers of the subjects with some foreign belligerent power. No better illustration can be desired

than that which is furnished by the circumstances under which our Act passed. Your Lordships all recollect the strong sympathy which was felt within the realm with the revolted Spanish colonies. The idea of any succour going from the realm by enlistments of men, or equipments of vessels, to Spain against the revolted colonies, was one from which the public feeling was entirely abhorrent. And therefore it is obvious that this kind of thing is likely to happen if there is no restraint; while the Sovereign professes neutrality the people may be acting unneutrally, or large bodies of people may be acting in such a manner as to expose the country at large, in respect of which the Sovereign represents all the people, to a suspicion of wilfully conniving at and participating in systematic unneutral conduct on the part of the subjects, in spite of the neutrality which the State itself professes.

And this is likely to happen with regard to this class of actions in a manner not like the case of ordinary contraband, as I will show you; and it is pointed at on the face of the statute. If there be a war, in which, though the Sovereign of Great Britain professes neutrality, yet a great number of the subjects act in a manner directly contrary to it and supply a force by enlistments of men (I take that as an example), by organizing expeditions of men to go and serve in the armies of the belligerent whom they favour, or which is practically just as noxious, by organising naval equipments, it is perfectly plain that the result will be this, a state of things will be produced which alters the balance of power practically, and in consequence of that partiality of those subjects of the neutral state as between the two belligerents, something is done which throws a power from the neutral country into the scale of one of the belligerents against the other, and which makes the belligerent who suffers by it say, I care not what your Vattel, or Grotius, or Puffendorf may say; I find that I am practically suffering from this, and you call yourself neutral, but your subjects are sending navies and are sending armies to take part against me in the war, and it alters practically the conditions of the warfare. So that it is better worth my while to go to war with you too, and to have it out openly, than allow this state of things to go on.

Can any one doubt that that is the way in which such a state of things would work practically as between a powerful country and a weak one? Let me imagine that we were at war with France, and that all the private dockyards in Sweden and in the United States, and in the Netherlands, or wherever else they may build ships, were at work day and night to fit out and equip vessels of war for France, then it would be a question of policy as between us and a great power like the United States, whether the evil had become so intolerable that it would be better to complicate ourselves with an additional war with so powerful a country rather than to endure it. But it might, I think, be quite conceivable and possible that we in that case, as we, I think, have done in all similar cases in the course

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

of our history, might say, We will not endure it, and if this goes on we will rather go to war with you than let war be carried on practically against us from your shores under pretence of neutrality. That we should do that with a weak power like Sweden, can any human being entertain a doubt? These are the dangers that have to be provided against. A belligerent state, under those circumstances, does not stop to examine whether this is a dealing in contraband, whether it comes within the general rules applicable to munitions of war—to shot and muskets and other things, which are the subjects of mere mercantile dealings. It looks broadly at the practical mischief which it is suffering. It says, It is in substance as noxious to me as if it were war carried on from your shores, and I will not endure it.

The Legislature saw that danger, and the Legislature thought it necessary to guard against it. And if your Lordships will observe, the language is, "may be prejudicial to and tend to " endanger the peace and welfare of this kingdom." My Lords, the peace and welfare of this kingdom would be endangered even if such difficulties stopped short of war, even if it were merely a disturbance of friendly relations with other countries, even if there were the seeds of future wars only sown and animosities engendered. It is perfectly manifest, therefore, that as such occasions might tend to produce such results, the Legislature might most wisely take out of the general category in which it suffered other contraband dealings to remain particular kinds of contraband dealings and proceedings not previously forbidden by any kind of international law whatever on which anybody could lay his finger, but which, nevertheless, when they proceed to a certain point, might become so intolerable to the nations that suffered from them, that they might be supposed to be likely to result in danger to this kingdom. Let me put the sort of case which might arise, and your Lordships will see at once that I am not stating an imaginary case. Let me put the case of a naval power so strong as to blockade all the ports of the enemy, so that not a single ship of war can come out of those ports. Is it not a practical cause of complaint, that in the territory of some neutral power, secure in her immunity as a neutral, where no attack could be made, arsenals should be established, from which ships might be sent out ready or all but ready; and, whatever may be the quibbling distinctions which legal arguments may introduce, which will be ready and can be made ready very soon by the most easy means and the most practicable methods, to take the sea, clear of the blockade; and by possibility (we cannot say how far this might go) multiplying in such numbers, that the entire advantage of the naval superiority possessed in the first instance by the blockading power might be entirely destroyed by means of the partialities of the subjects of the neutral state, and an asylum afforded in the neutral state for operations substantially belligerent carried on there under the eye of the belligerent power, but in the neutral territory?

Now, my Lords, I approach the matter a little more closely, and I must, in the first place, demur to the very strong things which some people say about ordinary contraband trade. I do not propose to take your Lordships into that discussion, which you will find most learnedly conducted, I think, by Mr. Duer in his book upon Marine Insurance, as to whether or no such language as that which has been read from Chancellor Kent is entirely unexceptionable, in which he speaks of two conflicting rights, the right of the neutral to carry contraband of war, and the right of the belligerent to intercept and capture it. Now I apprehend that, for the purpose for which Chancellor Kent has used the language, it was entirely accurate. He merely meant this: the law of nations does not impose upon any neutral Government the obligation of preventing its merchants from carrying contraband. The law of nations at the same time justifies the belligerent as against the neutral in treating it as hostile when they catch it. There is no sanction beyond that which the law of nations imposes; and if there be any obligation in the matter elsewhere than within the sphere of the dominion of the law of nations, where a belligerent power can exercise acts of force, it is an imperfect obligation. Mr. Duer and many others think that it is not a happily chosen phraseology to express such a state of things by the words "conflicting rights," or by language such as I think I have heard to-day in Court from one of your Lordships, "perfectly lawful."

*Lord Chief Baron.*—At what page is that passage in Duer to which you have referred?

*Mr. Attorney General.*—I have not got the book in Court, but there is a whole chapter upon the subject of marine insurance of contraband.

*Mr. Solicitor General.*—It is in the first volume of Duer, my Lord, at page 750.

*Mr. Attorney General.*—A similar expression to that has, I think, fallen from the Bench here; and I also say as to that, with sincere respect, that I believe it to have been used in the same sense; yet I cannot but think that if it were critically examined some exception might be taken to it. I mean the expression "perfectly lawful." I do not think myself that those things which are contrary even to an imperfect obligation can be regarded as being in strictness "perfectly lawful." A neutral power would surely not submit to the capture of the vessels of its subjects on the high seas, and the rule of international law authorizing that capture would never have been established, if it were held that the carriage of contraband to the ports of a belligerent is by international law perfectly lawful. It is lawful in this sense, that there is no sanction to enforce the law which prohibits it, except that of the right of the belligerent power to seize. But I apprehend that in a country where neutrality is professed, and where the Sovereign imposes upon Her subjects the duty of neutrality, it is not to be regarded as a thing entirely according to good morals, as a thing unexceptionable and absolutely

ARGUMENT.  
 3rd Day.

right in itself. And that is a consideration not to be forgotten when we enter into these general considerations as to the supposed favour to contraband trade which the Legislature must be imagined to have had in passing this statute, and with respect to the supposed desire not to restrict that trade. I say that I do not think a contraband trade of that kind is regarded as so absolutely righteous and lawful even by municipal law, much less by the law of nations.

As to this part of the case perhaps your Lordships will allow me to mention to you a passage in Bynkershoek, chapter ix., "*De statu belli inter non hostes*," which I do the rather because the passage was referred to in a document which I believe was not generally considered in Europe to state the doctrines of international law incorrectly. I mean the answer sent by the British Government to Mr. Seward in the case of the "*Trent*." The passage which I refer to was mentioned in that answer as containing perhaps as good an exposition as could be found anywhere of the principle of the law of contraband. I do not know whether your Lordships will follow me conveniently if I read it in the Latin, if not, perhaps it will be convenient that I should translate it into English.

Lord Chief Baron.—We will try.

Mr. Attorney General.—"*Quidni igitur amici nostri ad amicos suos, quamvis nostros hostes, ea adferunt quæ ante adtulerunt; arma, viros, reliqua?*" Then he goes on to say that the States General answered that question in the affirmative, and contended for the right even to send auxiliary troops to both belligerents. He continues thus—he differs from that: "*Horum* (that is, of neutrals)—*officium est, omni modo cavere, ne se bello interponant, et his quam illis partibus sint vel æquiores vel iniquiores. Et sane id quod modo dicebam non tantum ratio docet, sed et usus inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum hostibus commercia, usu tamen placuit (ut capite proximo latius ostendam) ne alterutrum, his rebus juvemus, quibus bellum contra amicos nostros instruatur et foreatur. Non licet igitur alteri utri adrehere ea, quibus in bello gerendo opus habet; ut sunt tormenta, arma, et, quorum præcipuus in bello usus, milites. Optimo jure interdictum est, ne quid eorum hostibus subministremus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere.*"

Your Lordships observe that those words cover the whole ground of contraband of war, cannon, arms, and soldiers, the most useful of all things in war. Ships are not mentioned; of course they would come under the same principle; and the prohibition of such trade by international law is stated to be upon the ground, that those who engage in it appear themselves in a manner to take part in the war, and to make war upon a nation with whom their State is at peace. That is the ground of the right of capture; and no doubt it is equally true that the right of capture is the only general sanction that is to



be found, and that municipal law does not, generally speaking, interfere with the carriage of contraband; and still more, that it is settled among nations, that no belligerent has a right to require any other nation to pass municipal laws to interfere with it. But it is equally clear, that the right of capture rests upon the intrinsic illegality of the thing by the law of nations; and that the principle of that illegality is, that it is a participation in the war *quodammodo*. And among the things that are mentioned by Bynkershoek, and which are all put by him under one category, you will find that *militēs* are one. The Foreign Enlistment Act takes *militēs* out of that category, and says that the enlistment of soldiers is a thing which shall not be done. It says they are a particularly noxious species of contraband, as to which the peace and welfare of the realm may be endangered, if they are left simply upon the general power of a belligerent to deal with them himself; and, therefore, our law steps in and deals with them. Then why should it not also deal with ships upon a similar principle? I think I am at liberty to say that.

But, my Lords, if I do not misunderstand them, the authorities to be found in the decisions of the Common Law Courts of this country have also recognized that principle, and have treated the contraband trade, which upon the high seas would be illegal according to the law of nations, not as a perfectly righteous and absolutely lawful and in every sense innocent trade, but as a trade *contra bonos mores*, which, although there be no positive law of the land to make it penal, nevertheless is a trade which the law will so far discourage and disapprove as to give it no aid or assistance. Upon that subject I will mention to your Lordships two classes of cases, one which has been mentioned already, the case of *De Wurtz v. Hendricks*, tried before Chief Justice Best, where persons, who in this country had subscribed to a loan to promote some foreign insurrection or rebellion, were held to have entered into a contract upon which they could not recover; it being perfectly clear that it is just as lawful to raise money and lend money as it is to sell ammunition of war, and to sell ships. And then the other authorities are three, one in the 9th Barnewall and Cresswell, page 712, "*Harratt v. Wise*," the 2nd "*Naylor v. Taylor*," in the same book, at page 718, and the third in 8th Bingham "*Medeiros v. Hill*," at page 231, in all of which it was rather taken for granted, I am bound to say, than decided, because the verdicts upon the facts in each case were in favour of the plaintiff, that if it were proved that there was a ship sent out under insurance for the purpose of running a blockade, going into a blockaded port, there was a legal prohibition against it by the law of nations, and that the assured could not recover. I do not think it was decided in those cases; but I cannot help thinking that enough fell from judges of great eminence to make it clear, at all events, that they entertained great doubt whether it was possible to recover upon such a contract. I will not go into that, because ultimately it would appear to turn upon the nice

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

question which has been much debated among jurists, as to how far a mere ordinary trade in contraband, not prohibited in law, is to be regarded as *contra bonos mores*, or as an ordinary branch of commerce. One thing I will say upon that subject, which is that when Her Majesty has issued that proclamation which your Lordships have printed in the book before you—

*Lord Chief Baron.*—The case which you referred to in the 8th Bingham says, “It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party.” If that be a correct analysis of the case (which sometimes these marginal notes are not), I do not see that it quite amounts to that.

*Mr. Attorney General.*—I do not think your Lordship will find that it is a very accurate note.

*Lord Chief Baron.*—Sometimes it is not. The report of the judgment of Lord Chief Justice Tindal is this, “The case of the ‘Neptunus,’ which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade, and that after notification of the blockade the act of sailing to a blockaded port with the intention of violating the blockade is in itself illegal. But neither that case, nor any other that can be cited, has laid it down that the mere act of sailing to a port which is blockaded at the time”——

*Mr. Attorney General.*—That is the point, my Lord.

*Lord Chief Baron.*—“Which is blockaded at the time the voyage is commenced is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port.”

*Mr. Attorney General.*—Exactly, my Lord, that is what I understood to be the view of the Court, and I believe that you will find the other cases, as far as they go, consistent with it; but your Lordships will, I hope, understand that I do not want to press this matter, which is very much beside the ultimate question, though it is connected with the introductory argument with which I am now dealing. I do not want to press it, nor am I wishing to obtain from your Lordships any expression of opinion on the point. I am only thinking that it ought to be borne in mind, that if any one approaches the construction of the Act with the idea that trade in contraband generally is a thing to be encouraged, and which the law looks at with approbation, that is certainly not a principle for which, as far as I can find, there is any authority in our law; and I do not think it is a principle easily to be reconciled with the recognition of international law, and the acquiescence of the neutral power in the capture of the ships of its subjects on such grounds. But, my Lords, I was going to add to that a reference, which I think ought not to be omitted, to Her Majesty’s Proclamation. Your Lordships will recollect that Her Majesty, in Her Proclamation, of which you have an abstract in the book before

you, at pages 12 and 13 of the Appendix, ends by warning Her subjects in these terms:—After stating her intention to be strictly neutral, and referring to the Foreign Enlistment Act, she warns her subjects, "That if any of them shall presume, in contempt of this Our Royal Proclamation, and of Our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign, in the said contest, or in violation or contravention of the law of nations in that behalf; as for example, and more especially;" then enlistment is mentioned; "or by serving as officers, sailors, or marines on board any ship or vessel of war or transport, of or in the service of either of the said contending parties, or by serving as officers, sailors, or marines on board any privateer bearing letters of marque of or from either of the said contending parties; or by engaging to go or going to any place beyond the seas, with intent to enlist or engage in any such service, or by procuring or attempting to procure within Her Majesty's dominions, at home or abroad, others to do so; or by fitting out, arming, or equipping any ship or vessel to be employed as a ship-of-war, or privateer, or transport by either of the said contending parties; or by breaking or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations for the use or service of either of the said contending parties; all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute or by the law of nations in that behalf imposed or denounced." No doubt, as to the law of nations, that applies to the contraband and blockade. As to the statute, that applies to the enlistment and to the equipment: but Her Majesty, declaring her neutrality, and warning all her subjects under those penalties to abstain from those unneutral acts, it would be a very strong proposition to say that the legislature of a country, when legislating on a subject connected with this matter, can be supposed to have regarded with any *à priori* favour the idea of contraband trade, or to have had any scruple whatever in cutting that down and restraining it by penalties in any matter as to which any such course was considered or might be deemed expedient with regard to the peace and welfare of the kingdom. I wish your Lordships to allow me to bring under your notice a matter that ought not,—I do not know what its ultimate bearing in your Lordships mind may be,—but it ought not to be forgotten in the consideration of this question, that when people bring forward arguments as to its being right to leave the trade in ships as free as the trade in gunpowder and other things of that description, that it is a remarkable fact that this is the present state of the law independently of the Foreign Enlistment Act, namely, that Her Majesty has the power whenever she pleases to prohibit every other species of contraband trade.

ARGUMENT:

3rd Day.

ARGUMENT.  
 3rd Day.

*Lord Chief Baron.*—No doubt.

*Mr. Attorney General.*—Yes, but she has no power by the statute that gives Her that authority, so to deal with a ship ; so that ships are left to be dealt with solely under the Foreign Enlistment Act.

*Lord Chief Baron.*—What is the statute ?

*Mr. Attorney General.*—The present statute on the subject is the 16th & 17th Victoria, chapter 107, and section 150. It is the Customs Consolidation Act. This is the clause. It is the result of the consolidation and in part extension of two earlier statutes, which I will mention to your Lordships afterwards. " The following goods may, by Proclamation or Order in Council, " be prohibited either to be exported or carried coastwise : " Arms, ammunition, and gunpowder, military and naval stores, " and any articles which Her Majesty shall judge capable of being " converted into or made useful in increasing the quantity of " military or naval stores, provisions, or any sort of victual " which may be used as food by man, and if any goods so prohibited shall be exported from the United Kingdom or carried " coastwise, or be waterborne to be so exported or carried, " they shall be forfeited." That I may mention is the consolidation and amendment of some earlier statutes, to which I will give your Lordships the references without reading them.

*Lord Chief Baron.*—I suppose they are in the margin of that Act of Parliament.

*Mr. Attorney General.*—Are they, my Lord ? They are not in the margin of the copy I have.

*Lord Chief Baron.*—You may find it in the quarto edition.

*Mr. Attorney General.*—I daresay you are right, my Lord. So that your Lordships see if at any time it should appear to Her Majesty that considerations connected with the peace and welfare of the kingdom may make it expedient to prohibit the export trade in gunpowder, arms, or any other species of munitions of war, Her Majesty has the power of doing it by Order in Council, which gives her over that branch of the subject a complete and absolute control ; but the statutes which give her that control do not extend to ships ; and if ships are not dealt with by the Foreign Enlistment Act, so far as they are not dealt with by it, they are not dealt with at all. Accordingly, your Lordships were reminded by one of my learned friends of the opinion of the Judges in Fortescue's Reports, given, I believe, in the year 1721, that Her Majesty had no power to interfere with any amount of supply of ships to the Czar, who was then engaged in war with Sweden. It is a consideration certainly not unimportant, that there is perhaps very good reason why the Legislature, having given Her Majesty power amply sufficient as to all other contraband of war, should have dealt specially with ships. But if the statute as regards ships is ineffective, this most important and most noxious of all contraband of war is left in an exceptional position, and it is out of the power even of the Sovereign to prevent its being dealt with in a

manner which might be prejudicial to the peace and welfare of the nation. And I could not help being struck with a remark which Sir Hugh Cairns made, when he was adverting to the frequently repeated expression, which I shall also often repeat again, about our ports being made arsenals for foreign belligerent powers; an expression which, I believe, is accurate as to that which might take place if to their full length all the arguments which your Lordships have heard, and especially those from my learned friend Mr. Mellish, could prevail. He says, there is no limit to what may take place with regard to cannon, with regard to rifles, with regard to every other species of contraband or munitions of war; that the Confederate Government may at this moment establish a Woolwich of their own—an arsenal—for the manufacture of all these things here. I take the liberty of saying that if I do not entirely misunderstand the principles of international law as applied between Government and Government, our Government would have a right to say, You shall make no such use of our territory; we will not permit a foreign Government for a moment to establish dockyards and arsenals and establishments of that kind in this kingdom; and the principle on which Washington acted would be distinctly applicable to such a case; but if there was a doubt as to our Government being able to deal with any foreign Government on that subject, here we have, in the Customs Consolidation Act, a statutory power entirely sufficient to deal with it; and none of those things could, under any such circumstances, pass out of the kingdom if it were held that the existence of such a state of things tended to endanger, as it most assuredly and necessarily would, the peace and welfare of the kingdom.

And now I wish to advert a little to what my learned friends have said on the subject of ships; at least, I do not know that they have said it, but I think I see some trace of it in what fell from his Lordship at the trial, as if ships were not on any intelligible grounds to be distinguished from other contraband of war. Now let me read to your Lordships a short passage from one of Lord Stowell's judgments on that subject, in which, I think, we may see the elements and the means of drawing a distinction; at all events, we may see very strong grounds for believing that the Legislature never meant to show peculiar favour to that particular kind of contraband, and to leave the trade in it less checked and less liable to be controlled than the trade in any other kind of contraband may be, whenever it becomes dangerous to the peace and welfare of the kingdom. I refer to what was said by Lord Stowell in the case of the "Richmond," reported at page 324 of the 5th volume of Sir Christopher Robinson's Reports. The passage I refer to is at page 331, but it is not unworthy to notice in passing that the ship as to which the question arose was a ship which was in substance, as his Lordship concluded, meant to be sold, after performing a certain voyage, to the enemy. The ship is described at page 325 thus: as a vessel well adapted—she was a merchant vessel

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

at the time—well adapted for a ship of war, and for the service of privateering. I think in another place it was mentioned as “easily convertible.” At the bottom of page 329 Lord Stowell says, “It appears that the vessel was originally built as a ship of war, and was easily convertible to warlike purposes, and it is established in evidence that the master conversed with several persons on this subject, and disclosed an intention of selling her at the Isle of France.” Now, how does his Lordship describe that particular kind of contraband. He says at page 331, “Here was an avowed intention of going to sell a ship to a belligerent, which in time of war is at least a very suspicious act; and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for purposes of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act.” “As a very hostile act,” your Lordships observe, “to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied.” Then he speaks afterwards of “the malignant nature” of such a purpose. I agree that he was dealing there with a case which clearly fell under the ordinary scope of international law; but the description which he gives of the nature of that particular kind of contraband I think in itself indicates very intelligible reasons why it should be thought right by a country desirous of preserving its neutrality to deal exceptionally with that species of contraband. There is another passage, in another of his Lordship’s judgments, which I will also trouble your Lordships by referring to, in connexion with that observation about arsenals which my learned friend made. It applies only by analogy; it is the case of the “*Fladøen*” which your Lordships will find at page 144 in the 1st volume of Christopher Robinson. The point turned upon this,—on the condemnation in a neutral port of a prize; which was treated as null and void, on the ground that a Prize Court could not, except under very special stipulations previously made between nation and nation, consistently with the law of nations be established in such a place. And the observations I refer to, although the station for a Prize Court applies only by analogy, are yet observations of which your Lordships will immediately see the application to every other similar case, where a station substantially useful for warlike purposes is acquired and obtained by a belligerent power within a neutral country. At page 144 Lord Stowell says this: “Mark the consequences which must follow from such a pretended concession” (that is, a concession by the neutral power to such a belligerent of the right to hold a prize court within its limits), “observe in the present case how it would affect the neutral character of the ports in the North! If *France* can station a Judge of the Admiralty at *Bergen*, and can station there its cruisers to carry in prizes

" for that Judge to condemn ; who can deny that to every purpose of hostile mischief against the commerce of *England*, Bergen will differ from *Dunkirk*, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of *Norway* the seats of the *French* tribunals of War, is to make the adjacent sea the theatre of French hostilities. It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him ; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found." Now let us for one moment pause, and consider the nature of this thing. This ship of war, my Lords,—it really might with propriety be said to be almost more like war itself,—a moving, a living, and an active war in itself, than a mere instrument of war. It is not a mere poetical figure, a mere poetical trope, in which it was said of a ship,—

" She walks the waters like a thing of life."

It is practically true, and true more especially of a ship of war, for she carries war where there was no war going on before, supposing the high seas to be free from privateers and cruisers and supposing the ports of one belligerent country to be blockaded, then if things are left without interference to their natural condition, according to the existing balance of power between those belligerents, there is peace on the high seas ; that which is spoken of in the preamble of this Act. The ships and merchandise of the belligerent power which has the superiority at sea, pass backwards and forwards over the high seas without any hostile acts being exercised against them. But the moment you launch upon the high seas, from a neutral port, ships which are either at that moment, or as soon after as it can be managed, put by means organized from the neutral country also into a condition to commit hostilities, you introduce and superadd, by operations of which the neutral country is the base, a maritime war, where there was none before, and which never could have taken place except by those operations so carried on in the neutral country. Well, is there no difference between the case of furnishing ships of war and the case of ordinary contraband which is sent across the sea, which acquires no noxious power at all until it is delivered in the enemy's country, which, on the seas, is not war, but mere commerce, and which can only be identified with war when it has been transported into the hostile country, and has gone through all the risks which it may meet on the road ? Let me for a moment apply to the same subject the test one has seen frequently suggested as to whether an adventure is a commercial or a warlike one—that an Act of this description is directed against warlike and not against mercantile adventurers. Well, a man who carries contraband across the seas, hoping to run a blockade or to deliver that contraband into the belligerent country, being a

ARGUMENT.

3rd Day.

neutral, is obviously engaged in merely a commercial adventure. It does not become a matter of warlike operation. It does not become a warlike operation until, as expressed in a speech of Mr. Canning's, "the elements of armament are combined" in the country at which the contraband is intended to arrive. But this ship is quite a different thing. The elements of armament are combined in her, either when she is on the high seas or in the neutral country, as the case may be, and she is herself, when she takes the waters, to a very great extent contraband ready made up, as Lord Stowell expressed it. But there is another thing which makes the one adventure commercial. The person who is concerned, the neutral carrier, is trading with his own goods, for his own profit, and, till he delivers them in the market to which they are about being taken, there is no person concerned in that transaction except a person whose purpose can be commercial only. But if the foreign Government, by its agents, orders ships of war to be constructed in a neutral country, and turns private dockyards of neutral merchants in a neutral country into its own dockyards, it is clear that its adventure is warlike from the first. That Government is the principal in the transaction. It causes these ships to be made and equipped, and for it they are built and equipped, and it has no purpose or object whatever in view of a commercial kind. It is purely and simply a warlike operation on the part of that Government, namely, to acquire and to launch from that point of departure ships to be used as instruments of war. Now, let me pursue the observations suggested by these distinctions a little further. If this may be done in a single case, of course it may be done on any scale—there is no limit to it. Whole fleets, if there be money or credit to pay for them, may be provided by neutral subjects: and when, as I have said before, it is according to experience probable that the sympathies of the neutral country, or of the people of the neutral country, will preponderate to the one side or the other, or that the wants of one of the belligerents respecting shipping will be different from those of the other, the practical consequence is almost inevitable, that if that kind of thing went on on a large scale, you would have one party served by means of it, and the other party suffering by means of it; and who that had the power to resent and prevent by force such a state of things, would for a moment endure it? Now I come to a further illustration, and here I am glad to find myself approaching ground which his Lordship adverted to by way of illustration in his judgment, which I have already mentioned. My friend Sir Hugh Cairns made it part of his proposition that in order to give no just ground of offence to the other belligerent there must be what he described as a chance of capture, that is to say, that the ship constructed and equipped in the neutral port must not pass the boundary line where the territory of a neutral state ceases in a condition immediately to defend herself against capture and to exercise acts of hostility. I have already observed, my Lords, and it will be in your recollection,



that I find, independently of his argument, no warrant for such a distinction. And I illustrated that by the case of the sale in the neutral country of a ship fully equipped. But put that aside for a moment. That is what my learned friend said. I want to see how that works. He added, or one of your Lordships did, that where the territorial right of the neutral ceases, there the belligerent right of the belligerent power begins. Consequently, that in order to exercise this right of capture, the cruisers and the ships of war of the belligerent power who might suffer by the exit of these vessels might be advanced to the neutral line and limit—to the very boundary—there lie in wait and watch, and it was their business to do so; that was the chance they had a right to have—to watch for the coming out of these ships from the neutral ports, and take them as soon as they did so. One of your Lordships added, as a further illustration of a thing that might possibly happen on the same hypothesis, that the belligerent cruiser might not even think it necessary to wait outside. It might be in port at the same time, and a company of two or three might go out together, one ship of the Federals, or of the Confederates, and this ship which was being built for the other of them, and they might fight out their battle the moment they crossed the line. Now, I ask your Lordships, whether, if we were to contemplate that state of things, that would not be a state of things which, within the meaning of this statute, according to the narrowest view, would be prejudicial, and would tend to endanger the peace and welfare of this kingdom? I should like to know what we should hear, if there were what would be called a blockade of the port of Liverpool by Federal cruisers? Are we going to put an interpretation on this statute which would invite the belligerent to establish a species of blockade at the mouths of our ports to be exercised on such vessels coming out as they shall imagine, if not intercepted, would develop into ships of war? Well, I can only say that I cannot imagine anything more calculated to endanger the peace and welfare of the kingdom, or to lead to troubles and difficulties between the belligerent power and the neutral, than if that state of things were allowed to exist. I cannot imagine any state of things which it would be more the object of the Legislature to prevent, than to make it necessary for the belligerent power, in order to protect itself from having the ports of a neutral turned into arsenals against her, to send a quantity of ships of war to hover upon the coast, upon the boundary line of the neutral power, to snap up the ships the moment that they came over that line. According to the argument of my friend, they would be entitled only to require that the ship should not be completely armed until it was across that boundary. Now your Lordship knows, that although it is pretty well settled, I believe, that three miles is the boundary and not the variable distance to which ordnance may from time to time travel—practically it is settled at three miles—yet it is impossible to contemplate such a state of things for a single moment

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

without seeing this, that of course it would be the object of the ship built for the purposes of war to get her armament at the earliest possible moment, and it would be her object, therefore, not to go beyond the boundary line more than she was compelled to do. Therefore there would be a constant liability to questions, in the first place, of causeless captures ; because, of course, the capture would often take place before the armament was completed. Then it would be said that the ship was not meant for warlike purposes at all ; and there would be a constant irritating series of discussions between the belligerent Government and ours, as to whether it was not a capture of an innocent merchantman, not proved to be guilty of anything wrong, having no armament on board, and not proved to be meant for warlike purposes. Secondly, the question would arise in other cases, whether or not the attack, or the prosecution of it, had taken place on the one side or the other side of the boundary line. I cannot imagine any state of things more utterly prejudicial to the peace and welfare of the kingdom, or more likely to embroil our Government, if our laws were so absurd, in quarrels with other nations. There is another argument. I am now passing from the distinctive character of a ship ; and I am dealing with the question whether this distinction is admissible that it is enough if she receives her complete armament on the other side of the boundary line. I say that if the doctrine were laid down that the completion of the armament, or getting her into a condition to commit hostilities, being finished beyond the boundary line, would take her out of an Act passed for the purposes for which this Act was passed, it would practically render the infringement of that Act an easy thing, and the Act itself, and the prevention of the mischief it was intended to prevent, as nearly as possible, idle and nugatory ; because, in the first place, the argument would assume that the whole thing must be done, or you must have it proved that it was meant to be done, within British limits, before you can act. But if the statute aims at prevention, can it be imagined that you are to wait till the thing is done ? It is clear you cannot ; but according to my friend's argument, you would be obliged to show positively that it was meant to be done within three miles of the coast of Great Britain. Why, of course, in the preparation of these things, it would always take this shape—the external evidence would be withheld, and it would be alleged *non constat* that it was all going to be done within that limit. And yet everybody can see, and must know, especially when you are dealing, in such a case as this, with a blockaded country, that all the equipments, and all the manning, and everything, would really come from the neutral state. It would be done wherever might be convenient, but always under the pretence that was it intended to be done elsewhere. It would be done here when more convenient, and when there was no vigilance to intercept it, and if not, it would be done just over the border, wherever the Act could best be evaded and got rid of. Now, in dealing with this statute, it is our duty to bring our

case within the terms of the statute, and when I come to reason upon the terms of the statute, I hope to satisfy your Lordship that it is within the language of the statute as it stands; and that it is my friend who is trying to put glosses upon, and to get out of the words of the statute, under the influence of these *à priori* notions, that the statute ought not to prohibit, and that it is unreasonable to hold that it does prohibit, those things which by express words I say are prohibited, and which are plainly within the mischief contemplated by the statute. But I want your Lordships, before I go to the next stage of my argument, just to follow me while I work out this point. My friend has supposed that foreign Governments have even a right to demand by international law that we shall not allow the things which he considers to be prohibited by this Act of Parliament. Well, I do not admit that right; but that, practically speaking, it was considered by those who passed the Act, that, if those things were allowed to take place, they would tend to endanger the peace and welfare of the kingdom, is clear; because the Act says so. Then you may take it either way; you may take it with my friend, and according to his view, that there was an international duty to prohibit these things; or take it as I prefer putting it, that whether there was that duty or not, the provocation to foreign powers and the danger of its leading to resentment, would be the same and equally prejudicial to our peace. I want to know how, in reasoning with foreign powers on one or other of those alternatives, they could be expected, for an instant to listen to those miserable distinctions which your Lordships have heard during the whole of this argument. This is an important consideration, and it is not wresting the meaning of the words at all; but the import of the words is, to prevent mischief; and this shows plainly that the mischief extends in every point of view to those things which my friend wants to take out of it. What? do you think that a foreign Government, whether founding their complaint or not founding it on international law, but having a cause of complaint that our ports are being made arsenals for its enemies,—do you think that such a Government would enter into the question whether the thing was principally done within the three miles and finished outside of the three miles from our coasts; the whole being organized here, the building taking place here, the equipment taking place here, the armament provided here, all under one plan and scheme, and sent from hence, and the manning too? Would a foreign Government, if it had a right to complain, admit for one moment such pettifogging distinctions as those? I think your Lordships can judge pretty well of that. They would tell you, “We are not bound by your municipal laws. It is your business to have such laws as will prevent our having just grounds of complaint against you.” Our learned Judges might say, “that is no reason why we should wrest the construction of our municipal laws.” But my friend

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

want you to wrest the construction against the policy of the statute, to the augmentation of the mischief, and to the prevention of the remedy; and that when it is perfectly plain that the mischief must extend to the cases they want to take out of it. Now I want to illustrate that, and I will take my first illustration from my friend's own argument. For another purpose, he referred to the well-known rule of international law laid down in the case of the "Twee Gebroeders," which I have mentioned already, from the 3rd Robinson, that if a person commences the operation, if the ship lies in wait for another within the neutral territory, and goes out of the neutral territory upon the high seas, far beyond the three miles, and there pursuing the operation commenced within it, captures or attacks a belligerent ship, although the capture, and although the attack, and although the whole engagement took place where we have no territorial rights, and beyond our limits, yet in as much as it is part of one transaction, and is to be referred to the commencement, it is to be all treated as if it were within the territory, and it is as much a violation of our neutral rights as if every part of it had taken place within our territory. I think the application of that principle is not difficult to such a case as one of these schemes for combination of the different elements of armament; all from this country, all by the instrumentality of our people, all part of one design and one operation. I will trouble your Lordships with one or two other illustrations. Your Lordships will judge how far the application of these cases to the mere construction of the statute is possible; that is quite a different question. I am now dealing with the mischief which the statute was meant to prevent, and therefore I refer to the cases I am mentioning with that view. The next case to which I wish to call your Lordships' attention is that of the "William," which your Lordships will find at page 395 in the 5th volume of Christopher Robinson's Reports. That was a case which raised this kind of question. What was the real destination of a ship which had an intermediate neutral destination? but, as the captor said, simulated, in order to disguise an ulterior, final, and true destination to a blockaded port?" Now there are observations, in the judgment of Sir William Scott in that case, which seem to me to be very applicable in principle to every case of the kind, whatever be the object, that it was meant to disguise or evade. He said this (the passage I refer to is at page 395), "Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected

" with any purpose of importation into the place where it is  
 " done. Supposing the landing to be merely for the purpose of  
 " airing or drying the goods, or of repairing the ship, would any  
 " man think of describing the voyage as beginning at the place  
 " where it happened to become necessary to go through such a  
 " process? Again, let it be supposed that the party has a motive  
 " for desiring to make the voyage appear to begin at some other  
 " place than that of the original lading; and that he therefore  
 " lands the cargo purely and solely for the purpose of enabling  
 " himself to affirm, that it was at such other place that the goods  
 " were taken on board, would this contrivance at all alter the  
 " truth of the fact? Would not the real voyage still be from  
 " the place of the original shipment, notwithstanding the attempt  
 " to give it the appearance of having begun from a different  
 " place? The truth may not always be discernible; but when  
 " it is discovered, it is according to the truth, and not according  
 " to the fiction, that we are to give to the transaction its charac-  
 " ter and denomination. If the voyage from the place of lading  
 " be not really ended, it matters not by what act the party may  
 " have evinced his desire of making it appear to have been  
 " ended. That those acts have been attended with trouble and  
 " expense cannot alter their quality or their effect. The trouble  
 " and expense may weigh as circumstances of evidence, to show  
 " the purpose for which the acts were done; but if the evasive  
 " purpose be admitted or proved, we can never be bound to  
 " accept, as a substitute for the observance of the law, the means,  
 " however operose, which have been employed to cover a breach of  
 " it." Again I observe that I am applying this as between Govern-  
 " ment and Government. I am not applying it to the question of  
 " the construction of the statute. I am dealing with the mischief.  
 " The next case I will trouble your Lordships, by referring you to,  
 " is the case of the "Washington." The "Washington" is a very  
 " remarkable case. Its history is this. You will find the case as  
 " it came before the Privy Council, shortly noticed in the second  
 " volume of Acton's Reports in a note at page 30. It is the case of  
 " the "Washington, Adams;" for there are several Washingtons in  
 " these Admiralty books, and it becomes therefore necessary to  
 " distinguish them. It was decided by the Privy Council on the 3rd  
 " of July 1809, by very great and eminent Judges, Sir William  
 " Grant, Sir William Wynne, Sir William Scott, and Sir John  
 " Nicholl. They reversed a sentence releasing the ship which had  
 " been pronounced by the Vice-Admiralty Court at the Barbadoes,  
 " and the ship had been taken under singular circumstances. I  
 " may mention that the ground of her condemnation, as I under-  
 " stand it, was "rescue," but that is not material here. The  
 " circumstances relating to the history of the ship were investigated  
 " in other legal proceedings, and reported in other books to which  
 " I will refer your Lordships, but the history was this. "The Wash-  
 " ington" was an American ship, she was to be employed in a  
 " slave trade adventure on the coast of Africa before the slave trade  
 " was abolished and made illegal by this country; I think in 1803.

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

She was in the port of Liverpool, and there was another British ship there called the "Croydon." The "Washington" was insured in this country for that voyage. By the law, your Lordships already know that the Crown had power to prohibit the exportation from this country of munitions of war generally, and an Order in Council was made exercising that power, no doubt for purposes connected with the war then pending, and allowing, by way of relaxation of the general prohibition, in favour of British ships, the exportation of certain kinds of munitions of war for the use of the slave trade on the coast of Africa. That was an indulgence given to British ships and not to foreign ships. It was also competent to allow to any ship as much as was wanted for the defence of the ship itself. Now these two ships were at Liverpool and had combined in this scheme. The "Washington," the American ship, wanted guns and powder, and the like; but she could not get them under the proclamation consistently with British law; she could only get leave to take a small quantity necessary for the defence of the ship; but the "Croydon," being a British ship, and having given a bond to employ those things in the slave trade only on the coast of Africa, was able to get the quantity which the "Washington" wanted. They therefore combined together in Liverpool for the purpose of carrying out this scheme. The "Washington" cleared out with the small quantity that she was allowed for her own defence; the "Croydon" got the quantity allowed to a British ship in the slave trade under the Order in Council, and they agreed that the "Croydon" should meet the "Washington" in the Congo river on the coast of Africa, and there deliver to the "Washington" those things which the "Washington" wanted. Well, that was done; and the ship was taken, as far as I can find out, for no other reason but that; and I should imagine that if the case had rested there it would have been a very difficult thing to maintain that as a belligerent capture. But I will not enter into that question now. It so happened that the crew made attempts to rescue the ship afterwards, and the Privy Council condemned her without reference to the original ground of capture, simply on the ground of the attempted rescue. Then afterwards there arose in this country and in Scotland, and eventually they came to the House of Lords, questions upon the insurance which had been made upon that ship. And it was held that the assured could not recover upon that assurance, because this was a fraudulent device and a concerted scheme to evade the law of this country. Your Lordships will find it reported in two books. You will find it at page 433 of the 5th vol. of Taunton's Reports, under the name of *Gibson v. Service*. It was an action upon a policy of insurance effected upon the American ship "Washington," at and from the Congo River, on the coast of Africa, to Charleston. The cause was tried before Chief Justice Gibbs at the Guildhall, when it appeared "that at the time when the policy was effected the 'Washington' and an 'English vessel called the 'Croydon' were both in the port of

"Liverpool. The 'Croydon' took on board a cargo of gunpowder and arms, and before she sailed her owners had given to the officers of the Customs at Liverpool, security in treble the value of the arms and gunpowder exported, that the same should be expended in trade on the coast of Africa, which is required by the statutes 29 G. 2 c. 16. s. 1, 2, 3, and 4, and 33 G. 3 c. 2. s. 4, coupled with a proclamation of His Majesty of 11 May 1803." I pause there for a moment to observe that the clauses in the different Acts of Parliament prohibiting exportations under an Order in Council, or a proclamation, do not enforce that prohibition by any other sanction than the forfeiture of the goods and the ship which exports them. There are no other penalties, and there is no misdemeanor. Then "the 'Croydon' and 'Washington' sailed from Liverpool; but before they sailed, it was agreed between their respective owners that the 'Croydon' should make over a part of the gunpowder and arms to the 'Washington,' on the coast of Africa, conceiving it would still make a part of the cargo of the 'Croydon.' Gibbs, C. J., thought that the agreement between the owners of the 'Croydon' and 'Washington,' that the 'Croydon' should deliver to the 'Washington,' on the coast of Africa, arms and gunpowder which she had legally taken on board for trafficking on that coast, was illegal; that it was in effect an illegal exportation by the 'Washington,' which had given no security, that they should be trafficked with on that coast. The effect was, that the Americans did by this contrivance get arms from this country. If such an agreement could take effect on the coast of Africa, so might it at the mouth of the river Thames, and the consequence would be, that an American would get a full loading of arms and gunpowder at the mouth of the river, and go off insured by English underwriters. And under his Lordship's direction the plaintiff was non-suited." Then there was a motion to set aside the non-suit and to have a new trial, and Chief Justice Gibbs said, "The assured is carrying into effect the illegal act agreed on in this country. I have thought a great deal upon this case since I decided it, and I cannot raise to myself a doubt upon the question." His Lordship was of opinion that it was in effect an illegal exportation by the "Washington," by means of which contrivance the Americans got arms from this country, which, under the Order in Council, they had no right to do, although they only got them on the coast of Africa, and by a ship which went out as the "Bahama" did with the "Alabama." Another case arising out of the same facts came from Scotland to the House of Lords in the year 1840, at a distance of 37 years from the transaction, and your Lordships will find that reported under the name of *Stewart v. Gibson*, in the first volume of Robinson's Scotch Appeal Cases. The case begins at page 260. But I content myself with reading a short passage from page 276, which your Lordships will find in the judgment of Lord Chancellor Cottenham. "With regard

ARGUMENT.

3rd Day.

ARGUMENT.  
 3rd Day.

" to the question of illegality," his Lordship says, " I entertain  
 " no doubt that the Court of Session were right in pronouncing  
 " this transaction illegal upon the facts as they appear upon the  
 " papers. It is not disputed by the counsel at the bar that  
 " if we had before us a contract to do that which subsequently  
 " took place, it would be illegal. If the contract had been in  
 " so many words, that an adventure should go out, relating in  
 " part to certain articles of merchandise which might be legally  
 " taken, and in part to arms and ammunition, which by the law  
 " of the country could not be legally taken, and it was thereby  
 " agreed that in order to evade the law no part of the arms  
 " and ammunition should be carried out in the ship which was  
 " to carry out the other goods, but should be carried in another  
 " ship to a place out of the immediate power and jurisdiction  
 " of this country, and then should be trans-shipped into the ship  
 " carrying the merchandise, that would be a transaction illegal,  
 " in violation of British law, and a contract on which no relief  
 " could be given." Then I observe that Lord Brougham, at  
 page 293, though in the first instance he had made some strong  
 observations about the wickedness of slaving, says, " It is need-  
 less to remind your Lordships that we have in this case  
 " nothing to do with the illegality of the slave trade ; this trans-  
 action was some time before that was put down by law." Now  
 I cannot but think that these cases have a direct bearing upon  
 the case before your Lordships, and there are principles also  
 laid down in a decision in America which I will refer to presently  
 to a very similar effect. But I say that these cases are quite  
 enough to show that the transaction is substantially one, whe-  
 ther you divide it, as my learned friend suggests it may be divided  
 in order to be made legal here, or whether you do not so divide  
 it. And I say, if foreign Governments have either *de jure*  
 a right to complain, or *de facto* are likely to complain, of such a  
 transaction, they and their complaints cannot be put off by such  
 distinctions as that of attempting to separate the transaction into  
 its elements, and to say You cannot, complain because one part  
 of it took place in every sense in England, and another part  
 was only concerted, arranged, organized, and despatched from  
 England, and only not carried into effect in England in order to  
 evade some municipal law of this country. I said that there was  
 also an American case which was worth mentioning in connexion  
 with this subject ; though I cannot help thinking that too much  
 importance has been attributed to it as an authority bearing upon  
 the particular question which your Lordships have now in hand.  
 I allude to the case of the " Gran Para," which your Lordships  
 will find reported in the 7th volume of Wheaton's Reports. I  
 have often seen it referred to as a case having a very important  
 bearing on the whole matter now under argument. And there  
 are some valuable principles stated very forcibly in the judgment  
 to which I am now about to refer your Lordships. But I cannot  
 help thinking, that specifically it does not go far to rule such a



case as that before your Lordships, because the facts were these. The ship "Irresistible" was in every sense of the word built, equipped, manned, and armed within an American port, and went from that American port in a condition in which she might have committed hostilities at any moment, but with this disguise only; her armament was entered on her papers as cargo, and her crew were engaged for a limited time, as a mercantile crew. She had no commission; and it was not until she got into the territory of the power she was meant to serve, that the commission was given, and that the crew having been discharged, were re-engaged to serve that power. There can be no doubt, my Lords, if in truth there was not a real break of continuity between her subsequent employment and her original intention, that the circumstances under which she left the United States were so clear with regard to the nature and character of her armament as not to raise a question of the precise kind before your Lordships; but, still with regard to those disguises which were used, it may not be otherwise than useful to refer to what fell from the very eminent Judge in that case. Your Lordships will find it at page 471 of the 7th volume of Wheaton's Reports. There are various questions argued, which I am not going to trouble your Lordships with, relating to this ship "Irresistible." And Chief Justice Marshall, generally reputed, I believe, to be the greatest lawyer that ever presided over the American Courts, said this. It was like most of their cases—a case of restitution of prize. Prize cargoes seem frequently to have come within the United States jurisdiction, although the capturing vessels did not. The Chief Justice said, "That the 'Irresistible' was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo, cannot vary the case. Nor is it thought to be material that the men were enlisted in form, as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the 'Irresistible' sailed out of the port of Baltimore.

"But she was not commissioned as a privateer, nor did she attempt to act as one, until she reached the river La Plata, when a commission was obtained, and the crew re-enlisted. This Court has never decided that the offence adheres to the vessel, whatever changes may have taken place, and cannot be depurated at the termination of the cruise, in preparing for which it was committed; and as the 'Irresistible' made no prize on her passage from Baltimore to the River La Plata, it

ARGUMENT.

3rd Day.

ARGUMENT. " is contended that her offence was depurated there, and that the  
 3rd Day. " Court cannot connect her subsequent cruize with the trans-  
 actions of Baltimore.

" If this were to be admitted in such a case as this, the laws  
 " for the preservation of our neutrality would be completely  
 " eluded, so far as this enforcement depends on the restitution of  
 " prizes made in violation of them. Vessels completely fitted in  
 " our ports for military operations need only sail to a belligerent  
 " port, and there, after obtaining a commission, go through the  
 " ceremony of discharging and re-enlisting their crew, to become  
 " perfectly legitimate cruisers, purified from every taint con-  
 " tracted at the place where all their real force and capacity for  
 " annoyance was acquired. This would, indeed, be a fraudulent  
 " neutrality, disgraceful to our own Government, and of which  
 " no nation would be the dupe."

I need not read more of it. Of course the circumstances, as I have said, were strong circumstances, and not raising the distinctions relied upon here. But I cannot help thinking that, if the circumstances were such as I have been on this part of my argument throughout supposing, no foreign Government would listen for a single instant to the notion, that the whole building, equipment, and armament of the ship might be organised and done under arrangements having their origin here, and carried into effect from hence, merely because, forsooth, they were carried into effect, as to the final stage of them, on the other side of the three miles from the British coasts.

Now, my Lords, with regard to the principles of construction which ought to be observed with regard to this statute, I need not remind your Lordships of the general principles of construction with which you are all so familiar. Of course we all know of the resolutions in Haydon's case, which are referred to constantly, in Plowden. Your Lordships will find at page 694 of the second volume of Dwarrris on Statutes the following passage, in which the rules are laid down—

" For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:—

" 1. What was the common law before the making of the Act?

" 2. What was the mischief and defect against which the common law did not provide?

" 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

" And, 4thly. The true reason of the remedy.

" It was then held to be the duty of the Judges at all times to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

The succeeding observations show that, of course, that is only to be done by the fair interpretation of the language of the Act, of course not straining the language, so as to create a crime, as my Lord has said more than once, outside of that which is properly and truly expressed, according to a sound construction of the language. But when you have words which, according to a sound construction, may prevent the mischief and advance the remedy, they should be so construed. When you have words which, according to their natural meaning and sound construction, as they stand, will have the effect of putting down all subtle inventions and evasions for the continuation of the mischief, then that ought to be done. It is not that you are to wrest the language or introduce into the Act what you do not find there; but you are not to suffer it to be wrested in order to diminish the remedy, and leave as much as possible of the mischief untouched, under a notion, forsooth, that that is a principle to be applied to a penal statute.

ARGUMENT.

3rd Day.

It does so happen that we have the advantage of the ruling upon this subject of an American Judge in a case upon their Foreign Enlistment Act; and I will now refer your Lordships to that, because I do not think you will depart from the principle of it. It is a case which the moment it is stated explodes one fallacy of my learned friend Sir Hugh Cairns, who, pressed as he was from the bench by some questions as to the extent to which he carried his argument that this Statute is limited to what was previously illegal by international law—you will remember Mr. Baron Bramwell tried him with one or two questions as to how far he applied it to the clauses which relate to the enlistment of men in any part of the world;—my friend first said that those were matters as to which foreign Governments would have a right to complain if they were not suppressed; but he afterwards said, Oh! that part of it does not depend on international law at all, and it has no legitimate place in this statute, although it occupies four-fifths of the whole. It is not to suppress a practice prejudicial to the welfare of the kingdom, but merely to enforce the obligation of allegiance against particular individuals, according to the argument of my learned friend. Now it does so happen that the case to which I refer, which is the case of the *United States v. Workman and Kerr*, and is reported in Wharton's American Criminal Law, at page 905 of the 3rd edition, arose on the Enlistment Clauses of their Act, and not the Equipment Clauses. It arose out of some filibustering proceedings in Mexico, and this is the language of the learned Judge, Mr. Justice Judson, who charged the jury, and it appears to have been received with approbation by the Courts of that country. As in this case, the indictment in that case was a very long indictment, it contained 97 counts, setting out in different forms the offences supposed to be committed against the Act. He gets rid, of course, rapidly, of the mere questions of form, and then he says this, "First of all it is an undeniable proposition that all

ARGUMENT.  
 3rd Day.

“ penal statutes are to receive a strict construction. This is a penal statute, and it falls within this rule. The terms used are not to be extended beyond their natural import to fix an offence on the defendants; but this rule, on the other hand, does not require any such construction as to fritter it away and defeat its object, and annul the law itself. I will then state to you in the outset some of these essential rules, and point out their application. We are to look at the spirit, intent, and object of a law; what mischief it was intended to prevent, and in what manner the remedy is to be applied. What, then, is this law? Its great object, the all pervading object of this law, is peace with all nations; national amity.” That he could discover from the mere provisions of the Act, but we have it on the face of our Act in the preamble. The learned Judge continues thus: “ which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity; in short, to prevent war, with all its sad and desolating consequences. These being the objects of this law, they are sufficiently important to arrest the attention of both Court and Jury, and secure to the United States and to the accused a fair and impartial trial.” Then he goes on to say, that “ Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some military service, some attack or invasion of another people or country, state, or colony, as a military force.” Then he goes on to distinguish between what is commercial and what is military, in terms which, of there were not time to be expended on other things, I should have much satisfaction in reading to your Lordships.

Now, my Lords, having said so much on the general principles of construction to be applied in this case, having entered, as I have done, at some length, because I thought it important, into the question of the mischief, I now wish to take some notice in a general way, before condescending to any particulars, of the line of argument which has been addressed to your Lordships, derived from the antecedent history of the matters which led to this legislation, and the particular occasion on which it was made. Now, my Lords, I take the liberty of saying that it will be new to me if your Lordships’ judgment should give any countenance to the notion that the construction of an Act of Parliament of this kind is to be limited or cut down by any previous declarations or speeches of statesmen, or Members of Parliament, whether at the time of introducing it or at any other time, or by inferences drawn from any transactions of state which are no part of the legislation itself. I not only object on very obvious grounds, some of which I shall mention presently, to that as opposed to all known principles of construction, but I object for a still further reason.

*Lord Chief Baron.*—I think there can be no doubt in the mind

of any member of the Court that none of those matters which you are alluding to can be taken into consideration by the Court when they come to expound the statute. I take it they were introduced, as some other matters have been, to put the Court in possession of what may be called the history of the case. They can have no bearing whatever beyond that.

*Mr. Attorney General.*—I took them entirely in that view, and of course no one could for a moment imagine that for the direct purpose of construction they could be used.

*Lord Chief Baron.*—And I think I may add, with the sanction of all my learned brothers, that those matters, especially of foreign history, foreign decisions, and foreign acts, which the people of this country cannot be supposed to be aware of, or to have any knowledge of, and which they certainly are not bound to know, can hardly be taken into consideration when you come to expound a statute which is exceedingly penal. We must take the statute as we find it, and expound it as an Englishman ought to expound it, and without reference to any other country.

*Mr. Attorney General.*—Beyond all doubt; and the only use of referring to American decisions on the subject is simply this,—that where you find them to be the decisions of Judges on similar questions arising out of their own law, you give just as much weight to them as you would to the decisions of the same Judges upon any other question of law, and no more. I rather imagine that that would be the view that we should all agree in taking as to the purpose for which American decisions may be referred to; and with regard to these other matters, I was not inclined to doubt that my friend viewed them in the light your Lordship mentioned, as part of the history merely; or as my friend Sir Hugh Cairns put it, that they might be referred to for the purpose of placing your Lordships in the situation of the Legislature, as it were, at the time the Act was passed. Of course, I only wish to make such observations upon that part of the argument of my friend as shall restrict these matters to their proper province. I do not think, in point of fact, that for that purpose a reference to transactions such as were referred to, and speeches such as were referred to, is really very germane or useful; because I say that such arguments misrepresent, or at least there is great danger that they may misrepresent, the meaning relative to the subject in hand of the very speeches cited and the very transactions referred to. If a man is, for instance, in Parliament, arguing a question on the second reading of a bill, he does not go into the clauses, or the interpretation of them; but he takes a broad case, he speaks broadly of a patent obvious mischief, the strongest case he can think of that comes within the general policy. The principle of a bill is to repress that mischief and everything which may be conducive to it. He does not go into the details, but of course when you come to the details of legislation, the broad case, the flagrant invasion of the principle, will be surrounded

ARGUMENT.

3rd Day.

ARGUMENT.

3rd Day.

by safeguards, such as are necessary completely to effectuate the object and policy of the Act. Therefore it is very idle to say, this or that statesman spoke in such and such terms; they were very appropriate and very intelligible for the purpose for which he was speaking, but as he was not speaking with a view to construe the language of the clauses of the Act, it would be most absurd to suppose that his having used that language can throw any light on the object and policy of the Act. In truth, nothing was said which I should object to every member of the Court reading over and over again, if it had any bearing upon the matter, because it bears out my view of the general purpose of the Act, namely, that it was to vindicate our neutrality, and to prevent our being embroiled with foreign nations by operations, as to which other countries might say, "Whatever you call them, practically they are hostile to us." I think that was the view taken of it at all times; but as I do not think that ultimately we get any particular good from that part of the argument, I do not intend to dwell upon it in addressing your Lordships. But there was one argument which my friend Sir Hugh Cairns, by an ingenious device, contrived to make do duty in a more important direction, and that is what he said upon Washington's rules which preceded the enactment of the American statute. I have had on many occasions greatly to admire the ability, the ingenuity, and the courage of my learned friend; never more than on this occasion; and on this occasion in nothing more, than with respect to the reference which he over and over again made to those rules of Washington, as if they had become landmarks in the law of nations, as if they had laid down some fixed principles of international law, and then that the American statute having intended to embody those principles, and our statute, to some extent, being framed on it as a precedent, therefore, you are to look at those rules as embodying the principles meant to be protected and defended by those acts. What is the history of those rules of Washington? I can give it you very shortly. I will not read the passage, but I will give you the reference if you will have the goodness to make a note of page 712 of the last edition, that is, Lawrence's edition, of Wheaton's International Law. Your Lordships will find in a note there, concisely stated, what I think you will also find in an exceedingly excellent pamphlet, which it is, perhaps, legitimate to mention, and which has been lately published by a gentleman well known to me, Mr. Gibbs. I really think that the history of the matter is so well collected there that I cannot do better than refer to it.

*Lord Chief Baron.*—It is extremely useful to those who wish to look at the authorities; it collects them all together in a very convenient form.

*Mr. Attorney General.*—They are so accurately brought together that I felt myself justified in mentioning it, although ordinarily we do not mention any publication of so recent a

date. My Lords, the real truth of the case is this:—the policy of the American Cabinet with regard to the mode of maintaining its professed neutrality in the war then lately broken out between England and revolutionary France was undecided, and Washington's views fluctuated and changed from time to time. The American Government were in this peculiar situation, they were not able to permit the equipment of warlike vessels in their ports equally and impartially by both belligerents, because they had a treaty with France, of which you will find the details in the publication I have mentioned, which guaranteed France against privateers being armed against France in the American ports, and against any prizes taken from the French being brought into those ports.

ARGUMENT.

3rd Day.

Now you will find, both in the chapter of Chancellor Kent's work to which my friend referred where those rules are mentioned, and in Wheaton's International Law, and everywhere else, this to be laid down as the law of nations on the subject of the equipment of ships of war in a neutral territory; that it is perfectly competent, consistently with international law, for the neutral state to permit either party to make warlike equipments of ships, everything which is forbidden by the Foreign Enlistment Act on any construction of it, without breach of neutrality, or without any breach of international law, provided it be equally and indifferently permitted, by the neutral country, to both parties. But the Americans were placed in a situation by their treaty with France, which disabled them from allowing to England that which France was doing. So that the effect of the treaty was this; although it seemed that international law had made some provision for positive stipulations of exceptional advantages in favour of one belligerent, if those stipulations had been made before the war, yet there being nothing of the kind positive here, and it being merely a stipulation that the enemies of France should not equip ships of war against France in ports of the United States, it was impossible for the United States to permit France herself to equip such ships without violating the principle of neutrality, because they could not allow Great Britain to do the same. That led to the whole complication, and those rules which have been mentioned are not rules expressing, or at any time supposed to express, absolute obligations imposed by international law upon the neutral Government, but they are, as Chancellor Kent says in the passage which my learned friend Sir Hugh Cairns referred to, founded on the principles of international law; which are these, that the neutral Government has the absolute right to prohibit a belligerent Government from carrying on any operations of that description within its territory; and having the absolute right to do that, it will fail in its duty of neutrality if it does not either prohibit it to him, or else allow it also to his adversary. Well, these rules, made by a Government which could not allow it to both parties, are made in assertion of their territorial rights against both, in order

**ARGUMENT.**

**3rd Day.**

to avoid partiality to one contrary to the law of nations. That is the whole and sole connexion of those rules with the subject of international law. I think I will not pursue the matter further, though that connects itself with the American statute; for I may conveniently, I think, take up the history of the American statute when we begin to-morrow.

*Mr. Mellish.*—If your Lordship will allow me, I will hand you up this copy of the decree about the “Oreto.”

Adjourned to to-morrow morning at ten o'clock.

---



## ARGUMENT—*continued.*

---

### FOURTH DAY.—Friday, 20th November 1863.

---

*Mr. Attorney General.*—My Lords, when your Lordships rose yesterday I had been referring to a subject which was treated as of considerable importance by my learned friend, although in my opinion when its meaning and bearing are rightly understood, it will turn out to have none; yet I do not wish to leave that undemonstrated, and therefore I will say a little more about it. I allude to the rules which were made by President Washington and by his Government, on the 3rd of August 1793. They were headed, “Rules adopted by the American Cabinet as “to the equipment of vessels in the ports of the United States “by belligerent powers, and proceedings on the conduct of the “French Minister.” My Lords, it was an act of state, a political act, which was undoubtedly in this sense connected with rules and principles of international law—that it was warranted by those rules and principles under the circumstances in which the United States were then placed; but the notion of its being intended to be, or being in any sense whatever, an abstract declaration of the obligations and the rights of neutral states under those circumstances, is one for which there is absolutely no foundation either in history or in law.

Now, the real circumstances connected with those rules, will be best understood, I think, by, in the first place, bearing in mind the principles of law which I mentioned yesterday, and which your Lordships will find stated and explained concisely, but at sufficient length, at the beginning of the lecture of Chancellor Kent, from a passage of which Sir Hugh Cairns read to your Lordships upon that subject; it is a lecture on the general rights and duties of neutral nations; and for my purpose it will be quite enough to call your Lordships’ attention to the short headings in small letters at page 124 and page 126, to show what is the nature of the subject which is being treated of by Chancellor Kent in that lecture, and in the passages which precede the one cited by my learned friend as to these rules. The first head is, “Neutrals must be impartial.” That was what I mentioned to your Lordships yesterday. Now, that stands on common sense, evidently, but it is a principle recognized by international law, that if a neutrality is professed, it shall be an impartial neutrality.

ARGUMENT.  
—  
4th Day.  
—

Consequently you will not give advantages to the one belligerent which you refuse to another, unless, indeed, (for it seems to be considered, by the writers on international law, subject to this rather remarkable exception,) you are bound to do so by some antecedent positive engagement entered into with the one party not in contemplation of those particular hostilities. It seems to be thought that, subject to that qualification, it is a settled maxim; and so far it is a duty of neutrality towards other Governments, that you will be impartial, that you will not give to the one an assistance or a liberty within your dominions which you do not equally allow to the other. That is the branch of the subject which relates to the duty of a neutral towards the belligerents. Then the next head is at page 126, which is the duty of the belligerents towards the neutral. "Neutral territory inviolable."

*Mr. Baron Channell.*—Are you citing from the marginal paging?

*Mr. Attorney General.*—It is at page 126 of my edition; there are just within an inner margin in small letters, the words "neutral territory inviolable."

*Mr. Baron Channell.*—Your edition is a later one than mine; the marginal paging is preserved throughout all the editions.

*Mr. Attorney General.*—I beg your Lordship's pardon, page 117 is the marginal paging.

*Mr. Baron Channell.*—I have got it now.

*Mr. Attorney General.*—Having mentioned the duty of impartial neutrality first, which is a duty as I have said of the neutral to the belligerents,—he now mentions the duty of the belligerents to the neutral, "neutral territory inviolable;" and he goes into that.

My Lords, I of course am not going to detain your Lordships from the real question by a disquisition upon these subjects; but it will be perfectly well known to all I think who have examined the books, that even a capture or an act of hostility within the neutral territory is a wrong to the neutral rather than a wrong by the one belligerent to the other; and it is upon the ground of vindicating their own rights, that neutrals, whose territory may be invaded by acts of this description, in comity take care that restitution is made to the other belligerent. Therefore Kent, after stating the duty of impartiality by neutrals towards belligerents, goes on to mention the duty of belligerents towards neutrals—that there is to be no violation of territory. That duty extends to this. In the first place there is of course to be no act of hostility, nothing of that nature which Sir Hugh Cairns spoke of as a proximate act of hostility, within the neutral dominion; not only that, but no acts or operations whatsoever connected with the war and having for their object the promotion of the war are to take place within the neutral territory on the part of either belligerent, without the consent and permission, and against the will of the

neutral sovereign. That is the basis and the principle of Washington's rules. That is to say, it was to protect their own neutrality from the assertion against their will by the French Republican Government of the right to arm and organize vessels of war and expeditions within their territory, which the history shows that the French Republican Government were asserting upon a strained construction of negative terms in a treaty.

Now the political circumstances connected with that act of Washington, which it is quite necessary to remember in order thoroughly to understand the matter, were these. The United States Government, before issuing the rules which I have been mentioning, which was on the 3rd of August 1793, had upon the 5th of June in the same year given notice to the French agents within their dominion, that they would not permit those things to go on any longer which were being done; and had insisted that they should not bring in any prizes taken by any vessels which might be equipped or got ready for war after that date. But the French Minister and his agents continued to do it in spite of the United States Government; and that Government from reasons of policy, though they had engaged to Great Britain to prevent it, abstained from using the means in their power for a certain time to enforce those regulations. Your Lordships will find the state of the case very distinctly explained in a letter of Mr. Jefferson to Mr. Hammond, dated the 5th of September 1793, which is an annex to the treaty between Great Britain and the United States of the year 1794-5. My Lords, I am reading from Martens's Collection of Treaties, the 6th volume of the Supplement, and your Lordships will find that treaty with its annex at the pages 326 to 386 of that volume. Now, as I said, this letter is annexed to the Treaty, and is referred to for the interpretation of one of its articles. And this is Mr. Jefferson's account of the circumstances, which will at once place your Lordships, I think, in a correct view of the true position of the parties, and the true meaning of this political act of the United States. After referring to a letter which he had received from the British Minister, Mr. Hammond, as to certain ships, and the previous correspondence he proceeds thus:—"We are bound by our  
 "Treaties with three of the belligerent nations by all the means  
 "in our power to protect and defend all vessels and effects  
 "in our ports or waters, or on the seas near our shores, and to  
 "recover and restore the same to the right owners when taken  
 "from them. If all the means in our power are used, and fail  
 "in their effect, we are not bound by our treaties with those  
 "nations to make compensation. Though we have no similar  
 "treaty with Great Britain, it was the opinion of the President  
 "that we should use towards that nation the same rule which,  
 "under this article, was to govern us with the other nations,  
 "and even extend it to captures made on the high seas, and  
 "brought into our ports, if done by vessels which had been  
 "armed within them. Having, for particular reasons, forbore

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

" to use all the means in our power for the restitution of the  
 " three vessels mentioned in my letter of August the 7th, the  
 " President thought it incumbent on the United States to make  
 " compensation for them ; and though nothing was said in that  
 " letter of other vessels taken under like circumstances, and  
 " brought in after the 5th of June " (that was the date at which  
 the United States Government had said, " We will not permit  
 " it "), " yet, when the same forbearance had taken place, it was  
 " and is our opinion that compensation should be equally due."  
 And then he proceeds to say that it would be applied to cases  
 occurring even later, if under the like circumstances. So that the  
 state of things is made manifest ; in the first instance, the French  
 agents supposed that the treaty gave them not only negative  
 rights, but positive rights to equip and arm vessels as much as  
 they pleased within the ports of the United States, and, until  
 the 5th of June, they did so under that impression, and no  
 notice was given to them by the United States Government  
 that they were not to be at liberty to do so ; but on the 5th of  
 June the United States issued a proclamation, and gave notice  
 that this state of things was not to go on. Nevertheless, it did  
 go on ; and as Mr. Jefferson says, there were particular reasons  
 why, although they had promised the British minister that it  
 should be stopped, the United States Government abstained  
 from using the means in their power to stop it. Under those  
 circumstances they held themselves bound to make restitution,  
 and it was under the circumstances of those peculiar treaties, by  
 which they were bound to give effect to the rule of impartial  
 neutrality as far as they could, and at the same time to protect  
 themselves from the assertion by a foreign power of a right,  
 against their will, and against the notice which they had given  
 of their dissent and disapprobation, to equip and arm vessels  
 within their limits, that these rules were adopted by the American  
 Cabinet ;—and well may Chancellor Kent say, as he does say  
 (and it is all that he says of them), that those rules had a  
 perfectly good foundation in the law of nations. He says, at  
 the marginal paging 122, the passage which Sir Hugh Cairns  
 read, " The Government of the United States was warranted by  
 " the law and practice of nations in the declaration made in  
 " 1793 of the rules of neutrality, which were particularly recog-  
 " nized as necessary to be observed by the belligerent powers  
 " in their intercourse with this country. These rules were," and  
 then he states the substance of those rules, without their excep-  
 tions, and I will refer to them in a moment, as far as is necessary.  
 He goes on to say, " Congress have repeatedly by statute  
 " made suitable provision for the support and due observance  
 " of similar rules of neutrality, and given sanction to the prin-  
 " ciple of them, as being founded in the universal law of nations."  
 The principle of them to which he refers is merely this,—on the  
 one hand the observance of the obligation of an impartial neu-  
 trality towards the belligerents, and, on the other hand, the protec-

tion of the neutral's own territory from an unauthorized use of it by either belligerent, or both belligerents, for any purposes connected with war, which the Government thinks fit to prohibit; that is all.

ARGUMENT.

4th Day.

Now, the reason why my learned friend laid so much stress upon these rules, and tried to make so much of them, is obvious. In that political act, done under those circumstances, and before there was any legislation whatever in the United States on the subject, the Government took a distinction, which we find upon the face of the rules, between equipments *ancipitis usus* and those which were essentially warlike; and my learned friend wants you to infer, that, because in that political act done under those circumstances by Washington's administration, it was thought, in the absence of legislation, expedient to make that distinction for their present government and guidance, therefore you are to import that distinction into the interpretation of all subsequent legislation which has taken place upon the subject. It seems to me that anything more extravagant could not possibly be conceived; and, indeed, when we look at the rules themselves, it will not, I think, appear that that distinction clearly extends so far even as my learned friend imagines under the rules, because I observe that there is only one of those articles which relates to the original arming and equipping of vessels. I do not mean to argue whether or not arming and equipping are to go together there, but at all events "the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful." That is the first rule. Then the next rule permits the equipment of merchant vessels; that is lawful. The third rule, I think, clearly speaks of the equipment of vessels already in existence, and in the service of the Government; not vessels to be brought into existence by operations within the United States, but vessels existing already in the immediate service of the Government. "Equipments in the ports of the United States of vessels of war in the immediate service of the government of any of the belligerent parties, which if done to other vessels would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful;" which in fact is merely the ordinary hospitality shown by all countries in the world to all ships of war, (which I will observe upon when I come to the 8th section of our Act of Parliament), with an exception with regard to prizes taken from France, founded on the treaty obligations towards France. Then the fourth rule is this, "Equipments in the ports of the United States by any of the parties at war with France of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall have made prize," &c. That, no doubt, was the article which my learned friend particularly referred to, because he thought it useful to him. It was a particular distinction, which, in the circumstances which I have mentioned in this act of state antecedent to legislation, the United States Government thought

ARGUMENT.

4th Day.

fit to make, and the reason is obvious. They say, We prohibit, as an invasion of our sovereignty, independently of any legislation whatever, acts for manifestly warlike purposes done within our territory; but we do not think it necessary to carry that provision further in the absence of legislation, upon the general principles merely of the law of nations, nor to treat as an invasion of our territory acts which are doubtful and equivocal in their nature. We do not at present exercise our power of prohibiting such acts. Your Lordships will see the meaning of that, more especially when you remember what Mr. Jefferson said in the letter which I have read, namely, "We are bound by our treaties with three of the belligerent nations, by all the means in our power to protect and defend their vessels and effects in our ports or waters, or on the seas near our shores." Therefore, being able to limit and intending to limit according to their own sovereign will and pleasure the extent of the prohibition which was then made by the sovereign authority, they limited it in that way. But how that can be imported into the construction of the subsequent statute appears to me to be a thing utterly unintelligible; because, looking at the abstract principle of law which entitles foreign nations to do the one thing or the other, it depends entirely upon the will of the sovereign power of the country where it is done.

My Lords, my learned friend Sir Hugh Cairns, I think, in his argument upon that subject forgot, that it is the practice of all nations, when war breaks out in which they intend to observe neutrality, by their sovereign power to regulate the extent to which they will allow what otherwise would be permissible to foreign countries; and the principle always has been to give hospitality to the ships of war and other ships of foreign countries in those ordinary things which are universally necessary, and which do not tend to increase the means of carrying on war previously existing. And it really would be just as reasonable to say that the rules which our Government issued by proclamation at the beginning of the present war between the United States and the Confederate States, which your Lordships will find in print, I think, in a note to Mr. Wheaton's book at page 717 of the last edition.

*Mr. Baron Channell.*—And at page 12 of the Appendix?

*Mr. Attorney General.*—No, my Lord, I do not mean the Neutrality Proclamation, I mean the rules according to which by another proclamation, in February, I think, upon the occasion of the "Tuscarora" and the "Nashville," two ships which were a good deal talked about, coming into our waters, our Government thought fit to regulate, as against foreign belligerent powers, the extent to which their ships should enjoy the hospitality of our shores. It is a proclamation exactly *ejusdem generis* with these rules of 1793, and of which it may be said, with the same truth with which Chancellor Kent speaks of those rules that it is perfectly warranted by the rules of international law and founded upon them; namely, founded upon the prin-

ciple of doing what, in our judgment, we think best, to preserve an impartial neutrality, and to protect our territory from any assumption of power within it which we do not think fit to permit. I am not going to read those rules to your Lordships. I tell you where you may find them, and I say that you might just as well lay hold of those rules, and say, that there a line is drawn, and that everything within those rules is against the general principles of international law. Everything which they permit is assumed to be permissible independently of the particular will of the sovereign power, and it is said that it must therefore be presumed to be a principle which was borne in mind in subsequent legislation upon the same subject. Nobody of course could read those rules of our Government without seeing that a contention of that kind, with respect to them, would be perfectly monstrous, if it were brought forward to regulate the interpretation or even to influence the interpretation of subsequent legislation in our country, which has language of its own, which language in its natural sense would go beyond those rules. I gave your Lordships a reference to the page, it is page 717 of Wheaton. It would be clearly unreasonable in the one case, and it is equally unreasonable in the other.

ARGUMENT.

4th Day.

But, my Lords, I have Washington's own authority for saying so; and I have the authority of other great persons, judges of the American Courts, proving that they never took this view of those rules of theirs, upon which my learned friend builds his argument, that forsooth you are to look upon this Foreign Enlistment Act as a mere statute to give sanction to previously existing international duties, and not to go beyond the limits of those obligations, which limits he in this arbitrary way attempts to define.

Now, I will refer your Lordships to that which my learned friend mentioned, but thought it unnecessary to read, but which I cannot help thinking, is at least as germane as what he did read. I mean the President's speech to the two houses of Congress when announcing those rules, and his other acts connected with the same subject, and requesting that they would proceed to legislation. I will read it as matter of history, at all events as pertinent as that which we have heard connected with the rules. The President, on the 3rd of December 1793, said this, "As soon as the war in Europe had embraced those powers with whom the United States have the most extensive relations, there was reason to apprehend that our intercourse with them might be interrupted, and our disposition for peace drawn into question by the suspicions too often entertained by belligerent nations." And I observe, my Lords, there, that this falls in with the line of argument which I submitted to your Lordships yesterday with respect to the mischief; that the mischief is not to be measured by the proveable obligations which you can establish by what my learned friend called the letter of international law, though I confess I do not know where the letter of international law is to be found; but the suspicions entertained and feelings excited equally endanger peace. Washington goes on, "It seemed, there-

ARGUMENT.  
 4th Day.

"fore, to be my duty to admonish our citizens of the consequences of a contraband trade, and of hostile acts to any of the parties, and to obtain by a declaration of the existing legal state of things an easier admission of our right to the immunities belonging to our situation. Under these impressions the proclamation which will be laid before you was issued. In this posture of affairs, both new and delicate, I resolved to adopt general rules," (those are the rules in question,) "which should conform to the treaties, and assert the privileges of the United States. These are reduced into a system, which will be communicated to you. Although I have not thought myself at liberty to forbid the sale of the prizes permitted by our treaty of commerce with France to be brought into our ports, I have not refused to cause them to be restored when they were taken within the protection of our territory, or by vessels commissioned or equipped in a warlike form within the limits of the United States." Then he proceeds thus, "It rests with the wisdom of Congress to correct, improve, or endorse this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the Courts of the United States to many cases, which, though determined on principles already recognized, demand some further provisions." I think, therefore, there is nothing whatever which would lead your Lordships to suppose that this Act was introduced simply for the purpose of enacting as law the provisions of those rules; and it is manifest, when we compare the one with the other, that they differ so materially, that it is impossible that difference should have been without intention and without purpose.

Now, my Lords, I said that I could show you, that the idea of this Foreign Enlistment Act having been intended simply to enable the United States to enforce against its subjects obligations which were due from it to other belligerent governments, is an idea totally inconsistent with the judicial view of the matter, which has always been taken in the United States. I will mention to your Lordships in connexion with that subject two cases; one, the case of the "Alerta," which, in the 9th volume of Cranch, at page 355, where Mr. Justice Bushrod Washington gave the judgment of the Court; and the passage which bears upon this subject is the following:—"A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory; but without such permission the subjects of such belligerent powers have no right to equip vessels of war or to increase or augment their force either with arms or with men within the territory of such neutral nation. Such unauthorized acts violate her sovereignty and her rights as a neutral." Nothing can be clearer than that, but it does not rest on that authority only; for we find the same doctrine laid down in the case of the "Estrella," which is frequently referred to in other American cases, as a case of high authority; and which is in the 4th volume of Wheaton's



Supreme Court Reports. The passage in question is in the judgment of the Court at page 309, which was delivered by Mr. Justice, afterwards Chancellor, Livingstone. He says there, "So long as a nation does not interfere in the war, but professes an exact impartiality towards both parties, it is its duty as well as right, and its safety, good faith, and honour demand it, to be vigilant in preventing its neutrality from being abused for the purposes of hostility against either of them." I do not know that the principle for which I contend, as embodied in the law which I am now asking your Lordships to administer and expound, could be better expressed than that. "This may be done, not only by guarding in the first instance as far as it can against all warlike preparations and equipments in its own waters, but also by restoring prizes taken in violation of its neutrality." Then he proceeds thus, "In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard or neglect of it would inevitably expose a neutral nation to the charge of insincerity and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored. The United States, instead of opening their ports to all the contending parties when at peace themselves, as may be done if not prevented by antecedent treaties, have always thought it the wisest and safest course to interdict them from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments." Therefore, Mr. Justice Livingstone thinks that it is perfectly competent, where there is no treaty to the contrary, to allow both parties to come into your ports and equip; but he thinks it the wiser and the safer course, and the course most consistent with the safety, good faith, and honour of a nation professing neutrality, especially as we know that both parties in any given war will not practically enter for such purposes the ports of the same neutral, to take the course which the United States have done—namely, to interdict them both from fitting out or furnishing, and to punish those who may contribute to such equipments.

ARGUMENT.

4th Day.

*Mr. Baron Bramwell.*—What are we to understand by that? According to his opinion, but for the special prohibition in any particular case, would it be lawful for the subjects of a neutral state to fit out and arm a vessel, so as to be ready for hostilities when it left the neutral port?

*Mr. Attorney General.*—I apprehend that it is undoubtedly so. There was no municipal law in the United States or here, before the Foreign Enlistment Act, to prevent it.

*Mr. Baron Bramwell.*—Nay, as I understand, there was no international law.

*Mr. Attorney General.*—No international law whatever.

*Mr. Baron Bramwell.*—No international law which would prohibit, for instance, the arming, manning, and in every way

**ARGUMENT.** equipping a Confederate ship in this port for the purpose of committing hostilities.

**4th Day.**

*Mr. Attorney General.*—All that it is necessary for me to say is this—

*Mr. Baron Bramwell.*—I beg your pardon. All I want to know is this; what are we to understand as Mr. Justice Livingstone's opinion there?

*Mr. Attorney General.*—I think that it was his opinion, that there was no international law which would prevent it, provided the United States permitted it equally to both parties. My Lords, so far as I am concerned, I believe it is a matter as to which those who discuss these questions do not fully agree. Some think that on sound views of international principles such things ought not to be permitted by neutral nations; but, as far as I can find, American authority is distinctly in accordance with the answer which I gave your Lordship as to what I understood Mr. Justice Livingstone to hold; namely, that there is no international obligation, provided it is allowed equally to both parties, and that it rests merely upon municipal law. It was with reference to that subject that I referred to what Wheaton said of the controversy between Lampredi and Galiani; it is just the same thing to a belligerent who suffers, whether a ship fully armed and equipped for war is sold without having been previously equipped expressly with a view to that sale, or whether it was equipped with a view to that sale, because she equally comes out of the port of a neutral nation an instrument immediately adapted for hostilities.

*Mr. Baron Bramwell.*—What occurred to me at the time as a difference is this, that a vessel may be fully equipped and armed in every particular except the fighting crew; then if you sell her, you sell her still in an innocent condition; but what it occurred to me might make a difference would be, that in addition to what you may call her own capacity of mischief, she had the requisite crew on board—what struck me was, that then the port would be a station of hostilities.

*Mr. Attorney General.*—I will address myself to that presently; but I think your Lordship will see that although it is perfectly true that the passage which I read took no notice of the presence or absence of the crew, yet on the other hand it must be tolerably obvious that the Government which purchases such a vessel fully equipped and fitted out for war would take care to provide itself with a crew to take the vessel out of port. And in the ordinary and natural state of things, it is not to be presumed that a vessel would leave port without a crew, and I do not find anywhere the least trace of such a view being entertained as that the lawfulness or unlawfulness of such a transaction would depend upon the presence or absence of a crew sufficient to navigate the vessel for warlike purposes when she left the port.

My Lords, before I address myself a little to the observation embodied in the words, "station of hostilities," I will trouble

you with one more reference in connexion with the same subject, which we shall find, I think, in a note to Laurence's Wheaton,—it refers to a recent act of state rather than a judicial Act, but it is not, I think, unworthy of attention in those circumstances. You will find it at page 727, in a note to that page of the last edition of Wheaton's Elements. It was an act of state,—in fact, an opinion I think of the Attorney General, adopted by the Government in 1855, upon the occasion of a question arising between this country and the Government of the United States as to some recruiting for the Canadian service which was going on in New York. I think it may be in your Lordship's recollection that such a question arose. This is what is said in the opinion: "It is a settled principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral state for belligerent purposes without the consent of the neutral Government. The undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter is a hostile attack on its national sovereignty. A neutral state may if it please permit or grant to belligerents the liberty to raise troops of land or sea within its territory; but for the neutral state to allow or concede the liberty to one belligerent, and not to all, would be an act of manifest partiality, and a palpable breach of neutrality." Now, nobody can help seeing that this would meet the point which your Lordship has put; because troops by land or sea involve the case of the crew, and the view there expressed by the Attorney General of the United States and adopted by the Government was, that, if it is given to one, it must be given to all. Then he says: "The United States constantly refuse this liberty to all belligerents, applying with impartial justice that prohibition as made known to the world by a permanent Act of Congress." I cannot find the least trace of the contrary view in the American authorities. I am quite aware that Monsieur Hautefeuille, and some other modern writers who have discussed debatable questions of the law of nations, would not agree to that proposition; and your Lordships will not at all understand me as desiring to maintain the one side of the question, or the other, as an abstract proposition; all that I mean and desire is to show, that as between the Government of Great Britain and the United States it certainly is not to be assumed that the view of international law which my learned friend Sir Hugh Cairns' argument has supposed, is a view which has ever been established, nor can I in any books find it laid down as the view settled and established by that species of authority which alone can make international law.

*Lord Chief Baron.*—It is not very easy to say what authority will make absolutely international law.

*Mr. Attorney General.*—General consent, I imagine, my Lord, is necessary, and the usage of nations.

*Lord Chief Baron.*—What a wide proposition that is, "General consent."

Argument.

4th Day.

Argument.

4th Day.

*Mr. Attorney General.*—It is a very wide proposition, my Lord, no doubt. We recollect that in ecclesiastical matters there is a proposition called the Rule of St. Vincent of Lirius, "*quod semper, quod ubique, quod omnibus*;" and if that were rightly interpreted I believe that we should be within very large limits of ecclesiastical liberty. Of course I do not mean, nor is this the time or place to undertake to establish in what sense the words are used, but we know that those words are used in a practical sense. When there is anything approaching to a general consent of nations, illustrated by practice, and acquiesced in by practice, we may say (especially when the writers upon the subject lay it down as law) that that is a settled principle of law. But when you have all the writers that I can find in a particular country taking another view of the matter, and when the most which can be said of a view which, perhaps, in the abstract, may be reasonable, is that it has been advocated upon abstract principles of reason, but cannot be found recognized in practice, it cannot be assumed for any definite purpose to be such a settled principle of international law that you are to take it as the basis of the legislation of any nation; nor can one nation impose it upon another and say, "We are entitled to require you to govern your conduct by it."

My Lords, let me make an observation upon the expression "a station of hostilities," so convenient as it is to express in a short form the substance of an argument which has been addressed to your Lordships. I connect it with what my learned friend Sir Hugh Cairns spoke of as proximate acts of war. Now I say that there is no authority whatever for the proposition that taking a ship out of a neutral port with the means of carrying on war, is an act of hostility or a proximate act of war; it is no doubt an act tending extremely to injure in its result the neutral government, and so are the acts which the argument on the other side of this case seeks to vindicate; so is the act of sending out a ship not armed for war, but ready to receive her arms; so is the act of sending out a ship prepared for warlike purposes but in which some things are left to be done when she gets beyond a certain line of sea. There are many cases in which the supposition that there would be cruisers to intercept her is practically an idle one; cases in which there certainly will not be such cruisers. For instance, if at the beginning of this war the United States had thought it expedient to use this country for the purpose of creating armed vessels, the ports of the Confederate States being blockaded, it would be perfectly ridiculous to say that it would have been possible for the Confederate States, by any means in their power, to prevent the application of armaments to ships outside the boundary line of the British waters. A multitude of such cases will occur. The suggestion that in any case the thing is to be prevented by such means is unsatisfactory, because we know that even a blockade when established is very easily evaded, and therefore to rely upon that to prevent the means organized within neutral territory from

coming together so as to make the instrument of war complete, would be a very idle and a very unsafe reliance.

ARGUMENT.

4th Day.

My Lords, I therefore pass from that subject, and I come at once to the real point, as it seems to me. Of course I may seem in that respect to be drawing censure upon myself, for having occupied your Lordships' attention for some time with preliminary matter. A great part of it I think was perfectly germane—I mean what I said about the mischief which the statute was meant to prevent; the rest I must presume to be germane, because my learned friend, for whom I have so much respect, treated it as being so, otherwise I should not have introduced it. I now come to the Statute. I go to our statute at once, because I do not think it desirable to go independently into an examination of the American statute, except so far as a comparison of the two may illustrate the construction of our own; and therefore, what I have to say upon the American statute I shall connect with the examination which I shall make of the language and structure of our own.

Now I will first recur for a moment to the preamble, upon which I have made more than one observation, although I now propose to apply what I have to say upon it to what I have not noticed before, rather than to what I have. In the first place I call your Lordships' attention to the fact that on the face of this preamble "the peace and welfare of this kingdom" is the only thing spoken of as to be protected, and there is no indication, therefore, of an intention to limit it by any assumed obligations of this kingdom, or by the precise extent of any obligations of this kingdom, to any foreign belligerent power. Again, a very singular attempt was made to get rid of a difficulty by some of my learned friends, when they said, with regard to the greater number of the clauses of the statute (those relating to enlistment), that they did not really turn upon the same principle at all—that they were merely intended to compel the subjects to render due allegiance, and to vindicate the dignity of the Crown, and were not connected with neutrality or international obligation. Again, I observe that there is nothing in the statute about vindicating the dignity of the Crown, and nothing about the allegiance of the subjects; but the two things are coupled together, namely, the enlistment and engagement of the subjects to serve in war in foreign service, and the equipping, fitting out, and arming of vessels, all of which it is said may "tend to endanger the peace and welfare of the kingdom." I now ask your Lordships' attention to the manner in which this fitting out and equipping is spoken of, what is it that is mentioned in the preamble? "The fitting out and equipping and arming" (which we agree is just the same in substance as if we had the disjunctive instead of the conjunctive,) "of vessels by His Majesty's subjects, without His Majesty's licence, for warlike operations." It is not the fitting out and equipping in any particular manner, but in the preamble as well as in the body of the statute it is for a particular purpose, "for warlike operations." If it is for warlike

ARGUMENT.

4th Day.

" to use all the means in our power for the restitution of the  
 " three vessels mentioned in my letter of August the 7th, the  
 " President thought it incumbent on the United States to make  
 " compensation for them ; and though nothing was said in that  
 " letter of other vessels taken under like circumstances, and  
 " brought in after the 5th of June " (that was the date at which  
 the United States Government had said, " We will not permit  
 " it "), " yet, when the same forbearance had taken place, it was  
 " and is our opinion that compensation should be equally due."  
 And then he proceeds to say that it would be applied to cases  
 occurring even later, if under the like circumstances. So that the  
 state of things is made manifest ; in the first instance, the French  
 agents supposed that the treaty gave them not only negative  
 rights, but positive rights to equip and arm vessels as much as  
 they pleased within the ports of the United States, and, until  
 the 5th of June, they did so under that impression, and no  
 notice was given to them by the United States Government  
 that they were not to be at liberty to do so ; but on the 5th of  
 June the United States issued a proclamation, and gave notice  
 that this state of things was not to go on. Nevertheless, it did  
 go on ; and as Mr. Jefferson says, there were particular reasons  
 why, although they had promised the British minister that it  
 should be stopped, the United States Government abstained  
 from using the means in their power to stop it. Under those  
 circumstances they held themselves bound to make restitution,  
 and it was under the circumstances of those peculiar treaties, by  
 which they were bound to give effect to the rule of impartial  
 neutrality as far as they could, and at the same time to protect  
 themselves from the assertion by a foreign power of a right,  
 against their will, and against the notice which they had given  
 of their dissent and disapprobation, to equip and arm vessels  
 within their limits, that these rules were adopted by the American  
 Cabinet ;—and well may Chancellor Kent say, as he does say  
 (and it is all that he says of them), that those rules had a  
 perfectly good foundation in the law of nations. He says, at  
 the marginal paging 122, the passage which Sir Hugh Cairns  
 read, " The Government of the United States was warranted by  
 " the law and practice of nations in the declaration made in  
 " 1793 of the rules of neutrality, which were particularly recog-  
 " nized as necessary to be observed by the belligerent powers  
 " in their intercourse with this country. These rules were," and  
 then he states the substance of those rules, without their excep-  
 tions, and I will refer to them in a moment, as far as is necessary.  
 He goes on to say, " Congress have repeatedly by statute  
 " made suitable provision for the support and due observance  
 " of similar rules of neutrality, and given sanction to the prin-  
 " ciple of them, as being founded in the universal law of nations."  
 The principle of them to which he refers is merely this,—on the  
 one hand the observance of the obligation of an impartial neu-  
 trality towards the belligerents, and, on the other hand, the protec-

tion of the neutral's own territory from an unauthorized use of it by either belligerent, or both belligerents, for any purposes connected with war, which the Government thinks fit to prohibit; that is all.

Now, the reason why my learned friend laid so much stress upon these rules, and tried to make so much of them, is obvious. In that political act, done under those circumstances, and before there was any legislation whatever in the United States on the subject, the Government took a distinction, which we find upon the face of the rules, between equipments *ancipitis usus* and those which were essentially warlike; and my learned friend wants you to infer, that, because in that political act done under those circumstances by Washington's administration, it was thought, in the absence of legislation, expedient to make that distinction for their present government and guidance, therefore you are to import that distinction into the interpretation of all subsequent legislation which has taken place upon the subject. It seems to me that anything more extravagant could not possibly be conceived; and, indeed, when we look at the rules themselves, it will not, I think, appear that that distinction clearly extends so far even as my learned friend imagines under the rules, because I observe that there is only one of those articles which relates to the original arming and equipping of vessels. I do not mean to argue whether or not arming and equipping are to go together there, but at all events "the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful." That is the first rule. Then the next rule permits the equipment of merchant vessels; that is lawful. The third rule, I think, clearly speaks of the equipment of vessels already in existence, and in the service of the Government; not vessels to be brought into existence by operations within the United States, but vessels existing already in the immediate service of the Government. "Equipments in the ports of the United States of vessels of war in the immediate service of the government of any of the belligerent parties, which if done to other vessels would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful;" which in fact is merely the ordinary hospitality shown by all countries in the world to all ships of war, (which I will observe upon when I come to the 8th section of our Act of Parliament), with an exception with regard to prizes taken from France, founded on the treaty obligations towards France. Then the fourth rule is this, "Equipments in the ports of the United States by any of the parties at war with France of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall have made prize," &c. That, no doubt, was the article which my learned friend particularly referred to, because he thought it useful to him. It was a particular distinction, which, in the circumstances which I have mentioned in this act of state antecedent to legislation, the United States Government thought

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

" to use all the means in our power for the restitution of the  
 " three vessels mentioned in my letter of August the 7th, the  
 " President thought it incumbent on the United States to make  
 " compensation for them ; and though nothing was said in that  
 " letter of other vessels taken under like circumstances, and  
 " brought in after the 5th of June " (that was the date at which  
 the United States Government had said, " We will not permit  
 " it "), " yet, when the same forbearance had taken place, it was  
 " and is our opinion that compensation should be equally due."  
 And then he proceeds to say that it would be applied to cases  
 occurring even later, if under the like circumstances. So that the  
 state of things is made manifest ; in the first instance, the French  
 agents supposed that the treaty gave them not only negative  
 rights, but positive rights to equip and arm vessels as much as  
 they pleased within the ports of the United States, and, until  
 the 5th of June, they did so under that impression, and no  
 notice was given to them by the United States Government  
 that they were not to be at liberty to do so ; but on the 5th of  
 June the United States issued a proclamation, and gave notice  
 that this state of things was not to go on. Nevertheless, it did  
 go on ; and as Mr. Jefferson says, there were particular reasons  
 why, although they had promised the British minister that it  
 should be stopped, the United States Government abstained  
 from using the means in their power to stop it. Under those  
 circumstances they held themselves bound to make restitution,  
 and it was under the circumstances of those peculiar treaties, by  
 which they were bound to give effect to the rule of impartial  
 neutrality as far as they could, and at the same time to protect  
 themselves from the assertion by a foreign power of a right,  
 against their will, and against the notice which they had given  
 of their dissent and disapprobation, to equip and arm vessels  
 within their limits, that these rules were adopted by the American  
 Cabinet ;—and well may Chancellor Kent say, as he does say  
 (and it is all that he says of them), that those rules had a  
 perfectly good foundation in the law of nations. He says, at  
 the marginal paging 122, the passage which Sir Hugh Cairns  
 read, " The Government of the United States was warranted by  
 " the law and practice of nations in the declaration made in  
 " 1793 of the rules of neutrality, which were particularly recog-  
 " nized as necessary to be observed by the belligerent powers  
 " in their intercourse with this country. These rules were," and  
 then he states the substance of those rules, without their excep-  
 tions, and I will refer to them in a moment, as far as is necessary.  
 He goes on to say, " Congress have repeatedly by statute  
 " made suitable provision for the support and due observance  
 " of similar rules of neutrality, and given sanction to the prin-  
 " ciple of them, as being founded in the universal law of nations."  
 The principle of them to which he refers is merely this,—on the  
 one hand the observance of the obligation of an impartial neu-  
 trality towards the belligerents, and, on the other hand, the protec-



tion of the neutral's own territory from an unauthorized use of it by either belligerent, or both belligerents, for any purposes connected with war, which the Government thinks fit to prohibit; that is all.

ARGUMENT.

4th Day.

Now, the reason why my learned friend laid so much stress upon these rules, and tried to make so much of them, is obvious. In that political act, done under those circumstances, and before there was any legislation whatever in the United States on the subject, the Government took a distinction, which we find upon the face of the rules, between equipments *ancipitis usus* and those which were essentially warlike; and my learned friend wants you to infer, that, because in that political act done under those circumstances by Washington's administration, it was thought, in the absence of legislation, expedient to make that distinction for their present government and guidance, therefore you are to import that distinction into the interpretation of all subsequent legislation which has taken place upon the subject. It seems to me that anything more extravagant could not possibly be conceived; and, indeed, when we look at the rules themselves, it will not, I think, appear that that distinction clearly extends so far even as my learned friend imagines under the rules, because I observe that there is only one of those articles which relates to the original arming and equipping of vessels. I do not mean to argue whether or not arming and equipping are to go together there, but at all events "the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful." That is the first rule. Then the next rule permits the equipment of merchant vessels; that is lawful. The third rule, I think, clearly speaks of the equipment of vessels already in existence, and in the service of the Government; not vessels to be brought into existence by operations within the United States, but vessels existing already in the immediate service of the Government. "Equipments in the ports of the United States of vessels of war in the immediate service of the government of any of the belligerent parties, which if done to other vessels would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful;" which in fact is merely the ordinary hospitality shown by all countries in the world to all ships of war, (which I will observe upon when I come to the 8th section of our Act of Parliament), with an exception with regard to prizes taken from France, founded on the treaty obligations towards France. Then the fourth rule is this, "Equipments in the ports of the United States by any of the parties at war with France of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall have made prize," &c. That, no doubt, was the article which my learned friend particularly referred to, because he thought it useful to him. It was a particular distinction, which, in the circumstances which I have mentioned in this act of state antecedent to legislation, the United States Government thought

ARGUMENT.

4th Day.

" to use all the means in our power for the restitution of the  
 " three vessels mentioned in my letter of August the 7th, the  
 " President thought it incumbent on the United States to make  
 " compensation for them ; and though nothing was said in that  
 " letter of other vessels taken under like circumstances, and  
 " brought in after the 5th of June " (that was the date at which  
 the United States Government had said, " We will not permit  
 " it "), " yet, when the same forbearance had taken place, it was  
 " and is our opinion that compensation should be equally due."  
 And then he proceeds to say that it would be applied to cases  
 occurring even later, if under the like circumstances. So that the  
 state of things is made manifest ; in the first instance, the French  
 agents supposed that the treaty gave them not only negative  
 rights, but positive rights to equip and arm vessels as much as  
 they pleased within the ports of the United States, and, until  
 the 5th of June, they did so under that impression, and no  
 notice was given to them by the United States Government  
 that they were not to be at liberty to do so ; but on the 5th of  
 June the United States issued a proclamation, and gave notice  
 that this state of things was not to go on. Nevertheless, it did  
 go on ; and as Mr. Jefferson says, there were particular reasons  
 why, although they had promised the British minister that it  
 should be stopped, the United States Government abstained  
 from using the means in their power to stop it. Under those  
 circumstances they held themselves bound to make restitution,  
 and it was under the circumstances of those peculiar treaties, by  
 which they were bound to give effect to the rule of impartial  
 neutrality as far as they could, and at the same time to protect  
 themselves from the assertion by a foreign power of a right,  
 against their will, and against the notice which they had given  
 of their dissent and disapprobation, to equip and arm vessels  
 within their limits, that these rules were adopted by the American  
 Cabinet ;—and well may Chancellor Kent say, as he does say  
 (and it is all that he says of them), that those rules had a  
 perfectly good foundation in the law of nations. He says, at  
 the marginal paging 122, the passage which Sir Hugh Cairns  
 read, " The Government of the United States was warranted by  
 " the law and practice of nations in the declaration made in  
 " 1793 of the rules of neutrality, which were particularly recog-  
 " nized as necessary to be observed by the belligerent powers  
 " in their intercourse with this country. These rules were," and  
 then he states the substance of those rules, without their excep-  
 tions, and I will refer to them in a moment, as far as is necessary.  
 He goes on to say, " Congress have repeatedly by statute  
 " made suitable provision for the support and due observance  
 " of similar rules of neutrality, and given sanction to the prin-  
 " ciple of them, as being founded in the universal law of nations."  
 The principle of them to which he refers is merely this,—on the  
 one hand the observance of the obligation of an impartial neu-  
 trality towards the belligerents, and, on the other hand, the protec-

tion of the neutral's own territory from an unauthorized use of it by either belligerent, or both belligerents, for any purposes connected with war, which the Government thinks fit to prohibit; that is all.

ARGUMENT.

4th Day.

Now, the reason why my learned friend laid so much stress upon these rules, and tried to make so much of them, is obvious. In that political act, done under those circumstances, and before there was any legislation whatever in the United States on the subject, the Government took a distinction, which we find upon the face of the rules, between equipments *ancipitis usus* and those which were essentially warlike; and my learned friend wants you to infer, that, because in that political act done under those circumstances by Washington's administration, it was thought, in the absence of legislation, expedient to make that distinction for their present government and guidance, therefore you are to import that distinction into the interpretation of all subsequent legislation which has taken place upon the subject. It seems to me that anything more extravagant could not possibly be conceived; and, indeed, when we look at the rules themselves, it will not, I think, appear that that distinction clearly extends so far even as my learned friend imagines under the rules, because I observe that there is only one of those articles which relates to the original arming and equipping of vessels. I do not mean to argue whether or not arming and equipping are to go together there, but at all events "the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful." That is the first rule. Then the next rule permits the equipment of merchant vessels; that is lawful. The third rule, I think, clearly speaks of the equipment of vessels already in existence, and in the service of the Government; not vessels to be brought into existence by operations within the United States, but vessels existing already in the immediate service of the Government. "Equipments in the ports of the United States of vessels of war in the immediate service of the government of any of the belligerent parties, which if done to other vessels would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful;" which in fact is merely the ordinary hospitality shown by all countries in the world to all ships of war, (which I will observe upon when I come to the 8th section of our Act of Parliament), with an exception with regard to prizes taken from France, founded on the treaty obligations towards France. Then the fourth rule is this, "Equipments in the ports of the United States by any of the parties at war with France of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall have made prize," &c. That, no doubt, was the article which my learned friend particularly referred to, because he thought it useful to him. It was a particular distinction, which, in the circumstances which I have mentioned in this act of state antecedent to legislation, the United States Government thought

ARGUMENT.

4th Day.

"feited." Now, we will see presently what is the effect of the omission of those words in the English statute, and what is its probable reason. But let me pause for an instant, my Lords, to ask your Lordships to attend to the light which those words throw upon what the framers of the American Act, at all events, understood to be the meaning of the language which they had previously used.

*Lord Chief Baron.*—The construction of a British statute should be upon some grounds common to all the British subjects. You can hardly, I think, induce an English Court to construe a British criminal law upon grounds which would not be patent to all English subjects.

*Mr. Attorney General.*—Certainly not, my Lord, and I should be very much misunderstood if I were supposed to be asking your Lordships to do so.

*Lord Chief Baron.*—Supposing that without this comparison of the two statutes, the natural meaning of the English statute would be one thing, but that with that comparison those who are familiar with law would infer from the construction of the two Acts that the British statute was intended to go further than the Act of Congress; if that argument was not patent to all British subjects it would hardly be a legitimate ground of decision here.

*Mr. Attorney General.*—I use no such argument, my Lord, and I should have been greatly misunderstood if I were supposed to do so. I am going to argue to your Lordships that the plain meaning of the English statute is with me, and I illustrate that argument, as I think I am perfectly entitled to do, by comparing that statute with an Act of another country *in pari materia*, which for this purpose we will suppose our Legislature never saw, and showing your Lordships how it covers cases which are omitted in that other statute; and I shall afterwards, I think, show your Lordships that if you do not wrest the words and do not tamper with the language —

*Lord Chief Baron.*—You are rather arguing to show that the conclusions drawn by Sir Hugh Cairns were not correct.

*Mr. Attorney General.*—Certainly, my Lord, as I think I have a perfect right to do. Of course, if your Lordships were to tell me that you thought differently I should at once bow, but I think it not otherwise than legitimate and useful, to have the means of illustrating the argument which I shall urge upon the mere language of the English Act by another Act *in pari materia*, which differs from it, though it be not an Act of this country. I quite agree, that you must ultimately decline to construe the English Act with reference to the American, or to place any construction upon it which its own words do not justify, merely because it differs in some respect from an American statute. No doubt nothing could be more illegitimate than such a mode of construction, except perhaps construing it by speeches made in the House of Commons; but I think your Lordships

will find that the words are effectual for their purpose, and that this is brought home and point is given to the proof of it by what I say in comparing the one Act with the other by way of illustration.

ARGUMENT.

4th Day.

My Lords, the observation which I was about to make upon the American statute, I agree, is not an observation which arises upon the English statute at all, which omits the word "building" entirely in its language; but I may, nevertheless, be permitted to make that observation with regard to the American statute as bearing upon this argument, as an illustration of the meaning of the language. The Americans speak the same language as we do; and it is perfectly clear that here you have an example, as good at all events as anything which can be taken out of Webster's Dictionary, or Johnson's Dictionary, of the manner in which the word "fit out" is used, and what it is understood to cover; because here we have persons speaking the language which is expounded in one of the Dictionaries which I have mentioned, if there be any difference in the two languages. In one of the statutes, namely, the American, it is expressed that the offence consists in fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned, and so forth. What is to be forfeited? Amongst other things, "all materials which may have been procured for the "building and equipment thereof." It is perfectly plain, therefore, that the words used by the framers of that Act, in the language which they spoke in the earlier part of the section, were held to be sufficient to apply to a vessel in course of building, because "materials procured for the building thereof," of course could not apply to a vessel already completely built. It is only an illustration of the use and meaning of language. I shall have more illustrations of that kind to give your Lordships from American sources, and, perhaps, some from English sources also; but I think this an illustration not without value.

Now the absence of similar words in our Act is not any argument whatever to the contrary, for this plain reason; that by our law, as I apprehend, no materials which have been procured with a view to the use of them in building a ship become part of or are identified with the ship until they have been actually in some way appropriated to her. If appropriated, they are covered by the words which we do find in the English statute, "together with all the materials," &c. "which may belong to or "be on board of such ship or vessel." If she were in course of building, and supposing the language of the Act to be enough to strike a ship in course of building, materials which were appropriated to her, so as, for instance, to vest them in the person to whom the hull, as it was building, belonged, would be materials belonging to the vessel, and would be covered by this forfeiture; and there is no principle or reason, why any other materials should be.

Then, my Lords, I will observe upon the differences in the next clause, namely the 8th, before I proceed further in the argument.

ARGUMENT.

4th Day.

Now, in the next clause we have these two differences, which I have observed. The American statute, in its 5th section, prohibits the augmentation of the force of a ship of war coming into the United States, *inter alia*, "by adding to the number of " the guns of such vessel, or by changing those on board of her " for guns of a larger calibre." In the English Act your Lordships will observe that the words are "by adding to the number " of the guns of such vessel, or by changing those on board for " other guns," saying nothing about their calibre; therefore you have larger words. You are not to limit it by an examination whether the guns are of a larger calibre or not. Then, lastly, the words following in that clause of the American statute are, "or " by the addition thereto of any equipment solely applicable " to war." It has been preferred in the English statute to use the more general expression "or by the addition of any equipment " for war," so as to avoid the quibble as to whether it was "solely applicable to war," or might be applied also to other things.

Your Lordships recollect that Sir Hugh Cairns laid a good deal of stress upon the 10th and 11th sections of the American statute, which relate to bonds which may be required under certain circumstances, and to the power of the President to detain ships. My Lords, the 10th section deals with the case of an armed vessel, belonging wholly or in part to citizens of the United States. That is not in our Act at all, and I cannot perceive how its absence from that Act, or its presence in the American Act, can affect me prejudicially. That was a provision applicable to a particular class of ships, which in the American statute, I apprehend, would not at all cut down or limit the previous clauses. Then the 11th clause says "that the collectors " of the customs be, and they are hereby respectively authorized " and required to detain any vessel manifestly built for warlike " purposes, and about to depart," under certain circumstances. Now that is important, because it shows most distinctly that a vessel which is not provided with equipments exclusively applicable to war, provided she be manifestly built for warlike purposes, a vessel which, though not armed, has a cargo consisting of arms and ammunition, is within the purview of the Act, and is to be detained until certain security is given. That provision is not in our Act either. I do not myself think that it much affects the question one way or the other; but as far as its bearing goes upon the construction of the American Act, I do not think that it is that, which my learned friend has attributed to it.

My Lords, we now come to what I believe to be the ultimate point, namely, the proper meaning of the words which we have got. Now I take it first entirely upon the words as they stand, without reference to any other statute of this or any other country, and without reference at present to any authorities which may have been decided in any other country upon any Act *in pari materid*. My Lords, with regard first of all to these four

words, I think that I can show that each of those words has a sense, sufficiently different from the other to explain why the Legislature considered it expedient to put every one of them in under the disjunctive copula. Take the word "equip" for example. I very much agree with what was said by my learned friend, Mr. Mellish, whose argument appeared to me to have only one fault, namely, extreme brevity. I should have been very glad if it had been longer; but I very much agree with what he said about that word, namely, that it is a perfectly flexible term, covering very widely whatever is done, for the purpose of preparing a ship for the service which she is to perform. I do not agree that if it is not an equipment solely applicable to that purpose, it therefore is not an equipment for that purpose; but as to its largeness and signification I do agree with him; and there is one thing which may be covered by and included in the word "equip," which we cannot find to be covered by any other word here; I mean the crew, the manning. Your Lordships know, that in the French language the crew of such a vessel is called "*equipage*," and there can be no doubt that the word "fit-out" will not include the crew. Upon that point I may mention what I find in Lord Tenterden's book upon Shipping, where the fitting out and manning are distinguished; it is a passage in the 8th edition, page 134. "As the master in general appears to all the world the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship, the business of fitting out and victualling and manning the ship being left wholly to his management in places where the owners do not reside." There he distinguishes, and I think with accuracy, fitting out, victualling, and manning.

I think, also, my Lords (though I am not about to detain you by going into any proof of it), that if your Lordships should think it worth while to make a careful examination of Mr. Justice Story's judgment in the case of the "*Santissima Trinidad*," you will there find traces of his Honour having considered that the equipment of the crew was within the meaning of the American statute; but I will not lay stress upon that, because it is possible, that in the places where he uses the word "equipment" it may not be intended to be used with that object.

My Lords, I have mentioned one extremity of what the word "equip" may cover. I will now mention a subject which lies at the other extremity. Take the rigging, for example,—there is an example to which I will refer your Lordships without dwelling upon it in the case of *Frost v. Oliver*, which was tried before Lord Campbell, and which is reported in 2nd Queen's Bench Reports, pages 304 and 305, in which the rigging,—rope supplied for the running of the ship,—is the subject, and Lord Campbell over and over again speaks of it as necessary for the equipment of the ship. So that we have those two things, so to say, at the two extremities of the term "equipment." We have manning, a

ARGUMENT.

4th Day.

ARGUMENT.  
 4th Day.

thing most remote from the "furniture," and we have rigging, which, it may be, belongs to the category of "furniture." What, else is covered by the word I will not at present say, because I shall have some authorities to refer to as bearing upon that subject; but I venture to say, in order to let your Lordships know what you have to expect from me upon that point, that I demur to the proposition that "equipment" is an expression which comprehends nothing connected with the structure. I should be prepared to contend, and without much fear that your Lordships would not go with me, that many things connected with and entering into the structure of a vessel are properly within the term "equipment." For instance, in the case before you, I should certainly contend that those bulwarks which we have heard of, independently of the machinery and other things, were so. And my Lords, I should say, that if we were dealing with one of those cases, which, if I did not misunderstand my learned friend, Mr. Mellish's argument, he would be prepared to contend are outside the Act, I mean those cases of what are called steam rams and cupola ships and iron plated vessels, I should submit that although those things may in some sense be builders' work, and although they enter into the structure of the ship, yet if those things are not "equipment," I believe all persons who have hitherto used that word under similar circumstances have used it wrongly. However, for the present, I pass over "equipment," to return to it hereafter with the aid of authority. Perhaps before I entirely pass over it, I may mention that in the very excellent little publication which I mentioned yesterday, and not without your Lordships' approbation, I see that the derivation of the word "equip" is suggested from the German or High Dutch, *schip* or *schiff* as connected with the ship. I confess that I think the derivation of the word is a little obscure. At first sight people might think it connected with *ephuippia* or *equus*. I think that Mr. Gibbs's derivation may be as likely to be right as not, but I lay no stress upon it.

I pass to the word "fit out." Now the word "fit out" I think is *nomen generalissimum*, and is applicable to describe the whole operation from beginning to end; and if the case required it, I should not shrink from saying that, provided you had got the necessary evidence of intent, which, under those circumstances, of course would not be easy or obvious, every single act done, as has been said, from laying the first plank for the keel to the completion of the vessel in a state fit to go to sea, is legitimately covered by the term "fit out." If the whole thing is done for a particular purpose as one act, I say that every single part of it is only a step in progress to complete the whole. My Lords, in illustration of that, and bearing in mind that my argument by no means requires me to go to that extent, I will put this case—

*Lord Chief Baron.*—Mr. Attorney General, the present interruption arises from the necessity of providing for the business of



to-morrow here. I presume that there is no probability of all the counsel on the part of the Crown concluding to-day.

*Mr. Attorney General.*—I am afraid not, my Lord.

*Lord Chief Baron.*—I should imagine not; we cannot expect it.

*Mr. Attorney General.*—I shall conclude to-day, no doubt, but my learned friends cannot be expected to do so.

*Lord Chief Baron.*—Two members of the Court, one of them being Mr. Baron Bramwell, must attend at the Court of Criminal Appeal, which sitting, as you of course know, in respect of cases which require immediate determination, could scarcely be postponed even for so important a matter as the present. Would it, therefore, be inconvenient if the Court adjourned the hearing of this matter from to-day till Monday?

*Mr. Attorney General.*—To me it would certainly not be so, my Lord.

*Mr. Baron Bramwell.*—I should hope that one of the other Courts would find a substitute for myself, and then unless it is inconvenient to you, we could let this argument go on to-morrow. What it struck me it was desirable to know was whether it would suit you and those who are with you to proceed to-morrow.

*Mr. Attorney General.*—My Lord, the Solicitor General says, that it would suit him to proceed to-morrow. As far as I am concerned I must look to your Lordship's own convenience, because I hope that I shall certainly conclude to-day.

*Mr. Solicitor General.*—Will your Lordships allow me to say a word with reference to what Mr. Baron Bramwell has said. I should be very glad to go on to-morrow if it were convenient to the Court.

*Lord Chief Baron.*—It is difficult to imagine a case more important than the present one; and which for the interest of every one requires as early a decision as is consistent with the importance of the case; therefore we ought not to lose a day, but where the liberty of the subject is concerned, which is the case with respect to the Court of Criminal Appeal, it has been usual, and I think most proper, to consider that the liberty of the subject is a matter of the first importance in this country. We have sent to inquire, and I think that it would be sufficient if we could get the assistance of any Judge from either of the other Courts. I have no doubt that we shall be able to obtain it, and if so, we will go on with the case to-morrow.

*Mr. Attorney General.*—My Lord, I was going to illustrate what I said upon the word "fit out," which I say is *nomen generalissimum* capable of comprehending every individual act, provided it be all in pursuance of one intention to make a complete thing, or merely to create and to bring into existence a ship ready to take the sea, which I apprehend is the idea which is aimed at in all these passages. I say that the word "fit out" comprehends every single act connected with the operation tend-

ARGUMENT

4th Day.

ARGUMENT.

4th Day.

ing to that result, from the laying down of the keel to the end. It is not at all necessary for my argument in this case that your Lordships should agree with me in that, but at the same time I should not shrink in a proper case from urging that, and I will put this supposition to illustrate this argument. Supposing that I come into Court, having seized a vessel in the very earliest stage of its progress, when it was a mere hull, certain planks put together, but with evidence of an indubitable character, that it was done under a contract which is produced and proved to the Court, that the persons doing it would build and completely equip and arm that ship, (or I may omit, and will omit, the word "arm,") for a particular service, namely, that she should be employed in the service of the United States, the Confederate States, or any other such belligerent government to cruize and commit hostilities. Every single step *ab initio* would be a step towards the completion of that design. My Lords, I believe that I should be perfectly warranted in that view. There are certainly (I do not require the aid of them) some strong authorities at common law, which I will just mention to your Lordships without dwelling upon them, and I rather abstain from doing so, because I observe that some of them are collected in an able note of Mr. Finlason in his report of this very case of the Attorney General *v. Sillem* in his *Nisi Prius* Reports. There is the case of *Langton v. Hughes*, in 1st Maule and Selwyn, page 593, which has been frequently since referred to as a case of high authority, where, it being rendered illegal by Act of Parliament for a brewer to use anything but malt and hops in the brewing of beer it was held that a druggist who "sold and delivered drugs to the defendant, a brewer, knowing that they were to be used in the "brewery," was guilty of an illegal act, and "could not recover "the price of them." The language of Lord Ellenborough is very strong, in which he says, at pages 595 and 596, "The object of "the Legislature in passing the 42nd of George III. was to protect the public health and the public revenue. The health "which might be impaired by mixing with beer ingredients of a "noxious and unwholesome nature, and by trying experiments "with the liquors, and a large and important branch of the "revenue by providing that beer should be a liquor compounded "of malt and hops only, and not of adulterated materials. There "is a distinct prohibition in the Act against causing or procuring to be mixed any ingredient except malt and hops; and "a person who sells drugs with a knowledge that they are "meant to be mixed, may be said to cause or procure *quantum in illo* the drugs to be mixed."

*Lord Chief Baron.*—I should have thought that any person selling an article to be used in the commission of a crime, for the purpose of its being so used, and with the knowledge that it was to be so used, would be an accessory before the fact.

*Mr. Attorney General.*—I have no doubt that would be your Lordship's view.

*Mr. Baron Bramwell.*—It is extremely difficult. If a gunsmith makes a pair of duelling pistols, what then?

*Mr. Attorney General.*—I take it that it would be a question of fact in the particular case, and I quite admit that to attempt to bring home an offence of that kind might be a matter of difficulty.

*Lord Chief Baron.*—But suppose that a gun-maker sold a pistol, being told that it was to be used for the assassination of a particular person?

*Mr. Attorney General.*—That is a fair illustration. Supposing that he received a note from a man stating, "I am going to fight a duel to-morrow morning, I want a pistol; will you have the goodness to send me one and you shall be paid for it;" in that case I think the gun-maker would have a very considerable chance of being convicted upon an indictment.

*Lord Chief Baron.*—There might be some difficulty if he did not know what was the specific offence; as for instance, suppose that a man sold an article useful for house-breaking, and that the person who bought it committed the offence of burglary, if the tool maker knew nothing about where, when, or how the thing was to be done, but only knew of it generally, probably he could not recover the price if he were to sue for it, but I very much doubt whether he could be made an accessory before the fact in a particular crime afterwards committed. But if he were told "I want to commit a burglary at No. 3, in such a place," and he furnished the article, and the burglary were then committed, I think that he would be an accessory before the fact.

*Mr. Attorney General.*—I think that what your Lordship says is perfectly accurate, and I will not dwell upon further illustrations of that description. As it strikes me, the word "fit out" is perfectly large enough to comprehend the entire operation from its commencement to the end, and if that operation requires the creation of a ship as well as the adding of rigging, machinery, spars, and stores for the prohibited purpose, every single act done, from the laying down of the first plank in the keel, provided always that you are in a situation to prove that it is in order to do the thing prohibited, is equally within the prohibition. It is an "attempt" or an "endeavour"—it is an "aiding" and so on; as to which words I entirely subscribe to what has fallen from the Court more than once; that of course, those words which describe the "attempt" or "endeavour" can apply only to that which would have been done if not stopped and intercepted.

*Lord Chief Baron.*—The question remains—what is the thing which is prohibited?

*Mr. Attorney General.*—I know that it does, my Lord, and in order to illustrate what is meant by this "fitting out," I apprehend that it would be perfectly clear that any single act done for the purpose of producing a ship capable of taking the sea and fitted out to take the sea with this prohibited intent, would be an act struck at, in however early a stage of the operation it

ARGUMENT.

4th Day.

might take place,—and the word “fit out” as it appears to me, comprehends every part of the operation as much as the whole.

I pass over the words “or arm,” because they require no comment. Your Lordships’ minds are quite sufficiently addressed already to the point, that they are in the disjunctive.

Then the “attempt” or the “endeavour” we agree is that which would be completed if it were not stopped, as for example in the present case it is quite clear, unless I misunderstand the conclusions which the human mind ought to draw from facts and evidence, that this ship the “Alexandra” was being proceeded with, with a view to complete and prepare her in such a state that she might take the sea at all events, whatever might be the particular equipment and furniture upon her at that time, that she might be a ship prepared and ready to go to sea as a fully equipped ship for that purpose. That that was meant to be done within this country is an inference which is irresistible, as I understand it from the undisputed evidence in the case. It was only not done because the Government seized the vessel, but there was an attempt and endeavour to do it at all events.

Then as to “aiding, assisting, or being concerned in the equipping,” I quite agree that something which falls within the definition of the principal offence must be done or attempted to be done in this country for any one to aid or assist. At the same time, while admitting that, I can readily present to my mind many cases, in which those words would reach an act which was meant to be done partly here and partly elsewhere; because I apprehend that the prohibition to “equip, furnish, fit out, or “arm,” covers all arming, all equipping, all furnishing, and all fitting out, and that the mere fact that it is meant to be done half here and half elsewhere does not in the least degree render it lawful. Let me illustrate that also by a case,—Suppose that Canada were in insurrection, as once unfortunately it was, against the authority of this country, we know that some of the lakes and some of the rivers of North America, divide by a very short interval the American frontier from the Canadian. Can one suppose that an Act like this in the United States would not have been violated if there were a scheme of this description, —two dockyards, one on one side of the River St. Lawrence, and the other on the other side, and if a ship were to be built and fitted out to a certain extent upon one side and then sent over and completed upon the other? It seems to me perfectly clear that that would be equipping, furnishing, and fitting out within the meaning of this Act; although there may not have been all the equipments nor all the furnishings, nor all the fittings, which were meant at one time or another to be applied to the ship.

Now, my Lords, I have not yet observed upon the word “furnishing,” which I did not mean to omit. Not much need be said upon it; but it is important to observe, that while “fitting out” will include everything, and while “equipment” will include “manning,” which none of the other words reach, “furnishing” on the other hand, will apply to the smallest thing.

"Furnishing" does not mean the whole, but every article of furniture, everything done in the way of furnishing, is directly within the terms of the Act. So that this word, which is the smallest of all, is added in order to avoid the possibility of the cavil, that the other words are so large as to include everything. "Equipping" is put in in order to cover "manning" and perhaps for other reasons also; and "fitting out," is put in in order to make it large enough to include all; and "arming" covers another thing.

ARGUMENT.

4th Day.

Now, my Lords, (and this is the next point which is important,) I want to know what is the ground, upon which you are to qualify those words, otherwise than we find them qualified in the clause?

Here we come to the main issue between me and my learned friends. I say that they interpolate words into the clause. They insist that it is not to be read in its plain and natural meaning. They want your Lordships to introduce upon these general words, qualifications which the Legislature has not introduced; and with what object, and what effect? Why, advancing the mischief, and suppressing the remedy. Now I quite agree that in the construction of a penal Act, if you do not find words which reach the case, you are not to put them in, but if you do find words which reach the case, are you to strike them out? that is the question. If these words are not used by the Legislature with the limitations which my learned friend contends for, but are used without those limitations, and in a totally different way, what business have you to tamper with the words? What business have you to interpolate other words, or to twist and alter the collocation of the sentences? And to what end? To take out of the operation of the Act cases which, according to the natural meaning of the words, are within it, in order, as I have said, to advance the mischief, and suppress the remedy. That of course your Lordships will not do.

Now, let us see what the words are. I have observed upon "equipping," and so on, and will not observe further upon it. But what is the qualification? This: "shall equip, or attempt, or aid, with intent or in order that such vessel shall be employed in the service of any foreign prince with intent to cruise or commit hostilities." I pass over the interval. Now, my Lords, observe what my learned friends want you to do,—to take those words, "to cruise or commit hostilities" from the subject to which they are applied in the clause, and to apply them to a totally different subject. They are applied in the clause to the employment of the ship,—they are not applied as qualifications of the equipment. The words which Sir Hugh Cairns puts in are not there,—it does not say "to equip as a ship of war,"—it does not say, "to equip with an exclusively or distinctively war-like equipment,"—it says, "to equip, furnish, or fit out, or attempt to equip, furnish, or fit out, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince to cruise,"—and that is the only question of fact to

ARGUMENT.

4th Day.

be inquired into. If you prove, as a matter of fact, that the ship or vessel is intended to be employed in the service of a foreign prince to cruise or commit hostilities, have you not proved the whole case? It appears to me quite clear that you have, because the ship cannot possibly take the sea without having equipments, without having furniture, without being fitted out. We have proved that she is meant to be completed with the fitments necessary to take the sea within the realm. That is all which the word "equip" necessarily means, that is all that the word "furnish" necessarily means, that is all that the word "fit-out" necessarily means; and then I assume that you have proved the rest, namely, that it is with intent or in order that the ship or vessel shall be employed (not the equipments) in the service of a foreign prince with intent to cruise or commit hostilities. Now, as a matter of fact, we conceive that we have proved that—we conceive that we have proved that this ship is brought into existence and is to take the sea in order that she shall be employed to cruise or commit hostilities. Does the Act say that she must be in a condition to cruise or commit hostilities at the moment when she takes the sea? Does the Act say that nothing shall be necessary to be done to her by the foreign prince who is to employ her? Not a word of it. I have shown your Lordships already that the mischief of the Act will not be suppressed if you introduce such limitations, and the Legislature has not introduced them—they are not found here. The Legislature could not be ignorant of these evasions for which my learned friend contends. I quite agree that if the statute has not prohibited it they have a right to go outside the statute. But the Legislature has defined the offence by words which omit to qualify the words "equip" and "furnish" by reference to any particular kind of equipment, or any particular kind of furniture, and the only qualification is, that it must be done with intent or in order that the ship shall be employed in the service of a prince who means to make a particular use of her—to cruise or commit hostilities, or to use her as a transport or store ship. To say that it was necessary that she should be in a condition to do that the moment she passed the boundary line, when the Legislature has not said so, and when the effect of holding it is to stultify the legislation, and to enable, by the easiest possible tricks and devices, the real mischief to take place, is not certainly the province of any Court in construing an Act, and I find no words here which in any sense require or justify such a construction.

*Mr. Baron Channell.*—I understand your argument upon the seventh section to be this,—you read the section, equip and so on,—“in order that such ship or vessel shall be employed in the “service of any foreign prince, state, or potentate, or of any “foreign colony, province, or part of any province or people, or “of any person or persons exercising or assuming to exercise “any powers of government in or over any foreign state, colony, “province, or part of any province or people,” “with intent to

"cruise or commit hostilities," leaving out for this purpose "as a transport or store ship." ARGUMENT.

4th Day.

*Mr. Attorney General.*—I do. I may observe, upon those second words, "with intent," which no doubt are awkwardly introduced, we are all substantially agreed that the sense is just the same as if those words really were not there, for two reasons. First of all, the words which follow must be words of qualification applicable to "transport or store ship" as well as to "cruise or commit hostilities;" otherwise there would be this absurdity, that furnishing a ship for the purpose of being used as a transport or store ship, not to be used for belligerent purposes, would be rendered illegal. But that is not all. Your Lordships will find a conclusive proof that the legislature so used the words; for a little lower down, when you come to that part which relates to commissions, the words are, "or shall within the United Kingdom or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid," it is clear, that must apply both to the case of a "transport or store ship," and to "cruizing and committing hostilities;" the employment governs both.

*Mr. Baron Bramwell.*—I understand you to put it thus,—No doubt there must be some equipment, or furnishing, or fitting out, or arming; there must also be the intent of the vessel to cruise and commit hostilities.

*Mr. Attorney General.*—I beg your Lordship's pardon: with the intent that it should be employed in the service of a foreign prince?

*Mr. Baron Bramwell.*—Yes, I do not refer to those words now. Do you say, Suppose that any man were so foolish as to fit out his vessel in the most peaceable way, so as to be utterly incapable of committing hostilities or cruising, nevertheless, if he had the intent that she should do so, that would be a fitting out within the Act, and an intent within the Act, and would suffice.

*Mr. Attorney General.*—My answer would be, We have not yet come to the question whose intent you must have.

*Mr. Baron Bramwell.*—I wish to correct myself there again. Suppose the intent existed in the requisite mind, and there was an equipment, however ill calculated to carry the intent into execution, do you say that is within the statute inasmuch as there is the equipment and also the intent.

*Mr. Attorney General.*—I should not in the least shrink from answering that in the affirmative, though in doing so I should wish to accompany it with this, clearly that is a matter of evidence which would be extremely important. I mean when you come to the question whether this was the prohibited intent, the circumstance of the fitting being totally unsuitable would be very material.

*Mr. Baron Bramwell.*—I was about to put to you, supposing such an extreme interpretation of the statute as I have suggested were the correct one, when you came to deal with the question of

ARGUMENT.  
4th Day.

fact before the jury you might say, If you have the man before you confessing this folly you must find against him.

*Mr. Attorney General.* — I will take up the illustration your Lordship has suggested, and make one or two further remarks upon it. Suppose this case, that in letters put in evidence between the agent of the belligerent and the shipbuilder the foreign belligerent said this,—“ The circumstances of this “ war are such that I can turn to account against the mer- “ chandise of my enemy’s subjects an ordinary merchant ship “ with great ease ; if you supply me with the ship I intend to “ employ for that purpose, I will take care that such equipments “ are put on board her that she shall be able to deal with un- “ armed vessels on the sea, to destroy them and cruize against “ them ; I do not want you to make her a strong ship ; I do not “ want you to give her any of the peculiar fittings which are “ usually required for warlike purposes ; I can make her avail- “ able in this war, with the appliances I can put on board her, “ to cruize and commit hostilities, though she may be of the “ common mercantile construction.” I say that that would be within the Act.

*Mr. Baron Bramwell.*—I put a question to one of the counsel on the other side which he did not answer, and which seems to me to arise now, which is this : Supposing the cruising intent were what you may call not the immediate intent, the immediate intent of the equipment being to enable her to sail to a place where she would get the arms, but that the further intent was that when she got there she should be so further equipped, or manned, or what not, that she should be in a condition to cruize and commence hostilities.

*Mr. Attorney General.*—I say it is perfectly clear that that case is within the Act. I say the Act strikes the thing, and if you say it does not, you are construing the Act away ; you are doing that which the learned Judge in America said you are not to do, namely, frittering away the plain language of the Act of Parliament, in order to advance the mischief and to cut down the remedy. I say that the case your Lordship puts is struck by the Act according to the plain and natural meaning of its words. The argument of the other side requires you to tamper with them. I do not want you to introduce words, I do not want you to wrest the sense, but to abide by it, and to abstain from doing that which it is the duty of a Court not to do, namely, legislating here, and legislating against the express intent of of the Legislature. I will pursue my illustration further. There are powers perhaps so little advanced in warlike affairs, that, as against them, a kind of ship may be perfectly serviceable to cruize and commit hostilities, which would not be serviceable as against more civilized and advanced powers. Take the case of China. Her Majesty has been pleased not to observe a strict neutrality in the present differences between the Emperor of China and some of his subjects, and has given licence to some of her subjects to aid the Emperor of China ; but Her Majesty



might have been pleased to issue a proclamation enjoining strict neutrality. Very possibly a simple description of vessels would have been perfectly serviceable for such a war, common ships, such as require no fitments specially adapted for warlike purposes, might have been employed; but would that have been legal under this statute? Would the degree of civilization and advancement in the arts of warfare which the particular belligerent might have attained be the criterion by which to determine this particular fact, whether a particular ship had been equipped with intent or in order to be employed in the service of the Emperor of China against his belligerent subjects? I apprehend it would be absurd to say so, and any construction to that effect is legislation, not interpretation, and legislation of a most vicious kind in a matter upon which the peace and welfare of the kingdom, perhaps of the world, is declared by the Legislature to depend.

ARGUMENT.

4th Day.

*Lord Chief Baron.*—We can hardly act upon anything but what is the plain meaning of the statute, that is all we have to deal with; as to the peace of the world or the interests of the community we cannot take much notice of that, though we should be sorry to have to be insensible to such considerations. The only question we have to deal with is what is the meaning of the Act. We are bound to give the true meaning to the Act, and that sort of appeal to the peace of the world cannot weigh much with us.

*Mr. Attorney General.*—The Act of Parliament has appealed to it. I was reminding your Lordships that it was the object and policy of the Act to preserve the peace and welfare of the kingdom; perhaps I was going too far in saying the peace of the world; it is enough for me to speak of the peace and welfare of this kingdom. I say, your Lordships are not to wrest those words from their natural and ordinary and obvious meaning, so as to take the offence properly described by them, out of them, upon any assumed general notions of the objects of this Act. I point out to you from the Act itself, that its object is to suppress practices, which the common law was insufficient effectually to suppress, which the Legislature, according to the preamble of the Act, thought had a tendency to disturb the peace and welfare of the kingdom; and if there is any policy which it would be your Lordships' duty not to frustrate by forced and strained interpretation, surely it is such a policy as that. Now, my Lords, I go further, and I say that there is upon the face of this clause (if my learned friend, Mr. Mellish's argument, which seems to be directly against the words of it, be not right,) proof that the notion entertained on the other side is not correct; because their notion is in substance, that the ship must be fit to commit acts of war when she takes the sea and passes the boundary line of the neutral territory; otherwise it is clear you are not doing what they call a proximate act of war in sending her out. But how can she be in that state without arms? It is not necessary that she should be armed; it is clearly not necessary within the meaning of this statute that she should be in a condition to com-

ARGUMENT.

4th Day.

mit hostilities as soon as she crosses the boundary—she cannot commit hostilities until she gets her arms. And no doubt, if the interpretation which we imagined the Lord Chief Baron to have adopted at the trial were right, for which Mr. Mellish, I suppose, must be considered to contend, that all those words mean the same thing: that “arm” is implied in “furnish,” that “arm” is implied in “equip,” and that “arm” is implied in “fit out,” (we misunderstood my Lord I know now,) of course then I could well follow the argument to its conclusion; but I say that is not the language of the Legislature, and we have no right to foist into the language which the Legislature has used, which does not signify arming, and which is used in the disjunctive, an interpretation which imposes upon the words the sense of arming, unless you find something in some other part of the Act which unequivocally and beyond doubt obliges you to do so.

I take the liberty of saying, with regard to this subject, that the character of the structure and the purpose for which the ship is built may itself determine the character of the equipment. I cannot but observe here upon some of the consequences involved in the argument on the other side, that you are to separate the structure from the equipment, and to require in the equipment as separate from the structure something distinctively and particularly warlike; that argument goes this length; that if you find the structure to be unequivocally warlike,—warlike beyond the possibility of doubt,—though it be perfectly clear that the ship is built for a warlike purpose, and also that she is built with intent or in order to be employed in the service of a foreign prince; yet, being so built with that intent, unless the equipments also be distinctively warlike, when the structure is proved to be so, and the intent is so, yet forsooth she is not within the Act. Is not that legislation? Is that interpretation? There is not a word to qualify the words “furnish” and “fit out.” I have assumed the case that the ship as to structure is proved to be a man-of-war, the purpose of which is warlike—it is equipped—not armed—that clearly is not necessary; and there is nothing whatever left undone but to put its arms on board; and yet you are asked to say, what the Legislature has not said, that the equipment, as distinct from the structure, and distinct from the purpose of the ship, must be essentially a warlike equipment. I take the liberty of asserting, that you cannot do so.

*Mr. Baron Bramwell.*—Is that so clear? One has in one’s mind (of course there is no disguising it) the case of a steam ram; the ram may be said to be part of the vessel itself.

*Mr. Attorney General.*—No doubt it would be argued to be so.

*Mr. Baron Bramwell.*—Is not she an armed vessel.

*Mr. Attorney General.*—I should think so. Your Lordships will not suppose that I would not contend that she was an armed vessel; I should do so.

*Mr. Baron Bramwell.*—I understand your argument to be that a vessel built in a condition to commit hostilities, nevertheless might not be armed within the Act.

*Mr. Attorney General.*—Of course your Lordship puts the case of a particular vessel, as to which I certainly should contend that she was armed ; but I can put the case of other kinds of vessels, as to which it might be more difficult to contend that the vessel was armed, though it might be perfectly clear that she was a man-of-war. Your Lordships have heard a good deal in the course of the argument about the “Alabama.” A document was referred to as containing for the purpose of the argument an account of that transaction, in which it was stated that from the beginning it was reported, and there was no doubt whatever, that she was a man-of-war, that is, her whole build and structure were unequivocally those of a man-of-war ; there was no question that she was intended for that, and for no other purpose ; still there were no arms, there was no ram, there was no cupola, nor even armour plating, (as to which, if there were armour plating, I should also contend perhaps that she was armed ; it might or might not be the opinion of the Court that armour-plating would come within that definition). But cases are easily put. I have put one in which the ship beyond all possibility of doubt was a man-of-war. But it is contended that the structure is to be separated from the equipment, and however you prove that the structure and purpose were exclusively warlike, yet if your masts, rigging, and machinery are such as may be put on a peaceful vessel, if they are *incipitibus usus*, it is argued that it is not equipment and furnishing of a vessel “in order that such ship or “vessel shall be employed in the service of a foreign prince, to “cruise or commit hostilities.”

*Mr. Baron Bramwell.*—I take it the argument of the other side goes to this extent. If there were an undeniable vessel of war built fit neither for purposes of commerce, nor for pleasure, and she were sent out with ordinary masts and rigging, with no crew sufficient to man her, with no arms, no guns, and no ammunition, so that it would be defenceless if attacked by any vessel of war, I take it that the argument of the other side is, that that would not be an equipping, fitting out, or furnishing within the Act of Parliament.

*Mr. Attorney General.*—So I understand.

*Lord Chief Baron.*—That is what they say. On the other hand you say, if a mere merchant ship in every respect is built and sent out with a knowledge of its afterwards being intended to be converted into a vessel of war it would be within the Act.

*Mr. Attorney General.*—No, my Lord, I do not argue that.

*Lord Chief Baron.*—Afterwards intended to be converted into a vessel of war, being now a mere merchant ship.

*Mr. Attorney General.*—No, my Lord, those are assumptions which I do not adopt into my argument at all. I do not shrink from this case ; a ship is ordered to be built directly and immediately for a fixed purpose of war, but it is ordered to be built in the manner of a mere merchant ship which is not a vessel of war, there is no intention that something else shall happen somewhere or other, changing its character into a ship of war, it is intended

ARGUMENT.

4th Day.

to be now constructed, built, and equipped in the manner of a merchant ship, but not to be used as a merchant ship, but with the fixed, definite and determined purpose of war. I do not shrink from that case in the least. I say, if that case were proved as a matter of fact, it would be within the Act. It is not very probable that a ship, in itself exclusively applicable to the purposes of a merchant ship according to the custom of European nations could really be constructed with that intent.

*Lord Chief Baron.*—It might be used as a transport.

*Mr. Attorney General.*—Yes, as a transport no doubt it might, or as a store ship.

*Lord Chief Baron.*—There was once a proposal made to turn all the tugs into transports.

*Mr. Attorney General.*—I am much obliged to your Lordships for that exceedingly useful observation, because it reminds me of that which possibly I might have passed over, namely the bearing of those words "transport or store ship" upon the rest of my argument. It is perfectly clear that this notion of what I may call a special and differential equipment cannot be applicable to a transport or store ship, in the same sense as to a cruiser intended to commit hostilities. Is it meant to be said that no equipment will do, though the ship be intended to be used as a transport or store ship, which is not exclusively applicable to a transport or store ship? It would be difficult to point out equipments exclusively applicable to transport or store ships.

*Mr. Baron Bramwell.*—I did not say "exclusively" applicable.

*Lord Chief Baron.*—There are very few merchant ships that might not be used as transports.

*Mr. Attorney General.*—In all probability. It is quite clear that the equipping, fitting out, and furnishing, in order that the ship might be employed as a transport or store ship in the foreign service, is struck at in the Act. Mr. Baron Bramwell observed upon the word "exclusively," but the argument requires the word "exclusively," or distinctively, (which is the same thing); because all those fittings are applicable; it is only that they are not exclusively applicable; they are necessary in order to enable her to do her work; they are fittings out to enable the ship to take the sea for the service for which she is destined; and if arms are not necessary, (and it is plain that the Act does not require that she should be in a position to commit immediate hostilities,) what difference can it make that besides the arms there may be some additional equipments which require to be furnished before she can commit hostilities? I apprehend none at all. She is furnished and fitted out with the intent and for the purpose that she, the ship or vessel, shall be employed to cruise or commit hostilities. The mere circumstance that the person who employs her is to do something afterwards to make her fit for the employment besides the arming, it being clear that the arms are to be added afterwards, can make no difference.

Though it is not an observation to which, perhaps, much weight is due, I do not like to omit it. Permit me to ask you

to compare the language in that part of the seventh section with the corresponding language of the second section. I think you will find, as in the seventh, the main purpose of the employment is the material thing, so it is in the second, which deals with the case of a person enlisting or entering himself to enlist or agreeing to enlist "to serve as a sailor, or sail in or to be employed or engaged, or to serve in or on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose." The words, "intended to be used," which are separated by the disjunctive from "fitted out" and "equipped," there correspond with the words, "with the intent that such ship or vessel shall be employed" in the section which we have under consideration. The Legislature knew perfectly well, that ships which had not a special and differential equipment might be, nevertheless, most useful for such an employment, and that the object they were striking at might easily be accomplished if they permitted such an evasion; and therefore they have not permitted it.

I say, where you have as a matter of fact the purpose and intent of the employment of the ship proved, that determines the character of the entire equipment and of all the furniture, and all the fitting out from beginning to end. I will illustrate that, my Lords, by reminding you of a case which I mentioned for another purpose earlier in the argument yesterday—I mean the case of the ship "Richmond," before Lord Stowell, in 5th Robinson. It may be in your Lordships' recollection that that ship was condemned as contraband of war, because she was intended to be sold to the belligerent power. It is quite settled that the sale of a mere vessel of peace to a belligerent is not contraband; she must have been affected with a warlike character or purpose in order to make her so. The "Richmond" was at the time a merchant vessel, and had been actually employed as one, but, in the language of Lord Stowell, she was easily convertible into a man-of-war, and, in his judgment, intended to be sold with a view to be so used. She was therefore contraband and condemned, though her original character (had there been nothing to show that it was to be made subsidiary to warlike purposes) would not in itself have entitled her to be condemned.

Now, my Lords, it must of course always be borne in mind, that in a case where the matter of fact is controverted, the character of the equipments may be extremely important evidence of the intent and purpose; but I am assuming a case where you have the intent and purpose demonstrated *aliunde*. The distinctive warlike character of the equipment may by itself determine the purpose, not perhaps that it is meant to be employed in the service of this or that power, but that it is meant for war. The distinctive warlike character where you have it, is evidence of the character of the entire equipment from beginning to end. I must remind you that I am not driven in this particular case to rely, sound as I believe it to be, upon the argument I have been offering as to the full extent of the meaning of those words "equip" and "furnish;" for we are dealing with a ship

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

as to which this is in proof, not merely that she is a ship of which the build and the fittings are *ancipitis usus* in that sense that nobody could say they were not equally applicable to purposes of war and peace, but the evidence proves them to be more properly adapted for purposes of war, and to be such that a skilled person, looking at them, would say, "This vessel is fitted out for war, and not for peace." The evidence was, that she could not be used for mercantile purposes, though she might possibly be used as a yacht; but it obviously was the judgment of the witnesses that, from the build, and the fittings, she was not intended to be so used. You have it proved in the first place that there were bulwarks of peculiar strength, as to which the evidence goes to the length of saying that they were exclusively fit for purposes of war; because the evidence is this, that if not for purposes of war, if not to resist shot, they would be an incumbrance and an inconvenient weight, and that they were in a special sense intended and adapted for the purpose of war. We have the proof that this ship is built as a gun-boat coming from the very claimants themselves, from their foreman, Mr. Spiers; we have it proved by the admission of the builder himself that she was intended for and built as a gun-boat for the service of the Confederate States, under the orders of their agents. It is quite clear that the ship, being built as a gun-boat, has the equipments and fittings of a gun-boat, to this extent, at all events, that the bulwarks are adapted for that and no other purpose; so that it is not a case of fittings simply *ancipitis usus*, but of fittings specially adapted for warlike purposes; as to which the most that could be said is this, that they might also by possibility be used for one particular, though a most improbable, peaceful purpose. Can you say, under such a state of circumstances as that, if under any circumstances this argument is to be allowed, that the mere possibility that fittings and equipments that are peculiarly and specially adapted for the purposes of war may be applied to peaceful purposes (the same remark applies to hammock nettings attached to the bulwarks, which might be used for peaceful purposes, though the purpose and intent is proved) is a reason why you should say there is no equipment within the meaning of the Act? My Lords, I say that I might upon that evidence even go further, but I do not think it necessary for my case. I might very legitimately say this, We have proved that this ship is being built as a gun-boat for the service of the Confederate Government under the orders of its agents; and we have proved that the work which has been done upon her already is specially adapted for such a service, and that some part of it is not properly adapted to any other service, whether that has reference to the structure or the rigging or the machinery is not material, but the Government seizes her when she is incomplete. If it is necessary to draw an inference, what is the inference which you would draw? Why that she would have been completed if they had not seized her, with all that was proper for her as a gun-boat, within the realm, unless evidence were given to the contrary. The evidence was, that she only required the

iron plate for the pivot guns to turn upon it, for that really is the point. We proved that she wanted nothing to enable her, being a small ship, to receive that small number of guns, which of course, could easily be taken on board the moment she crossed the three mile line, or within it if it were necessary, to enable her to destroy the commerce of her enemies upon the ocean; nothing more was necessary according to the evidence than this, (and it could be done at any moment,) to screw down upon the deck, in the proper place, an iron plate for the pivot guns to run upon, which of course, could be shipped afterwards. Can it be gravely and seriously contended first of all upon this evidence, that it was not a reasonable inference that that would be done within the realm, where everything else was being done? But, secondly, if that inference is not to be drawn, can it be gravely and seriously contended, that, the proof being in other respects what it was, it would be a breach of the Act if the pivot plate were laid down within three miles from the British coast, although no guns and no arms were put on board her, but were added afterwards, but that there would be no breach if the pivot-plate as well as the guns were added outside? Your Lordships have heard, in my learned friend's comment upon the evidence, of a vessel called the "Phantom" built side by side with the "Alexandra," evidently not a ship of war. Suppose the "Phantom" had gone out with her, and carried not only guns but the pivot plate and screws, and that just outside the three-mile line she delivered the pivot plate and guns and screws all together, and the pivot plate was put on and screwed so that the ship was ready for work, can anyone sitting in the place of a Judge gravely and seriously say that if it would have been an offence under the Act to take her out without the arms, and put the arms on board beyond the three miles, provided the pivot plate had been put down first, it is not an offence to take her out without the arms and without the pivot plate being put down, provided that the pivot plate and the arms are going out beyond the three miles together? It is not necessary to talk about common sense in this matter; but I must say that it is a departure from the plain meaning of the words.

*Mr. Baron Pigott.*—You are not upon the point of the verdict being against the evidence yet, are you?

*Mr. Attorney General.*—No, my Lord; but it is unavoidable that one draws illustrations in argument from what is actually in evidence in the case. I agree that the two lines of argument upon the motion must be kept distinct; but at the same time I do not think that the illustration was illegitimate.

*Mr. Baron Pigott.*—By-and-bye probably you will tell us, supposing those words do not mean as you have contended, constructing the ship, but something done on board the ship after the ship is a perfectly constructed ship, what the evidence is of any furnishing, or fitting out, or equipping, after the ship has become a ship, we will say, within the definition, taking the definition of a ship as merely the hull.

*Mr. Attorney General.*—I will follow your Lordship in that.—It appears to me that there is sufficient evidence upon that

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

subject, supposing that view should be adopted ; but of course it will be in your Lordship's mind that I have already said, I apprehend it to be quite clear, at least I think that will be your Lordships' judgment, that the evidence pointed irresistibly to the conclusion that this ship was to be furnished with all the furniture necessary to enable her to go to sea ; and, that being so, I will not repeat what I have already argued, namely, that if she were taken in a state of hull, with proof that the making of the hull in that state was with the intent and the purpose to do more, and to equip within the realm, it would be within the Act.

Now I will come to what I conceive to have been the principal arguments, and your Lordship has just touched one of them, but not the one which I proposed to take first, on which my learned friends seemed to rely. I may call them negative arguments. The first was the absence of the word "build," and I think that from something which fell from my Lord, he appeared to be rather impressed with that argument. I am in your Lordships judgment, but I venture to submit that it is a somewhat dangerous thing to cut down the interpretation of the words which you have in an Act of Parliament, because some other word is not there. If the case falls within the words which you have, that is enough ; and the mere circumstance that another word is not added, for which there might be reasons, does not, I confess, seem to me to be a justification for departing from the proper meaning of the words which you have. But, secondly, I think that Mr. Mellish virtually answered that argument himself ; for he went on to argue in this way. He said, The Legislature omits the word "build," therefore it is meant to authorize building. Now I demur there, I say that it is only meant to leave untouched any building, provided there was not the equipment, fitting out, or furnishing, which is struck at by the Act. But he goes on to say ; *ergo*, it was meant to authorize building for those purposes ; *ergo*, it was meant to authorize any equipment necessary to enable the ship, when built, to take the sea. There I part company with him. I say that was just the reason why it was not necessary to put the word "build" in. He says it would be of no use to be allowed to build the ship unless it is to be able to take the sea. The answer is, that it was not the object either to encourage or to interfere with the mere building of ships at all. It is not the business of the shipbuilder that is struck at, his person, or his trade, or his purpose, but the business of the person who may be called the equipper, that is, the procurer of the equipment, which is struck at ; the author of the transaction which is warlike ; the man who has the warlike object in view. It is his intention which is struck at, the governing intention ; and the words used are words apt to cover everything that will enable him to accomplish his purpose. If it be true, as Mr. Mellish admitted, that a builder cannot build a ship for such a warlike purpose without equipment, that is a very good reason why it was not necessary to put in the word "build," because it is enough to put in the words "equip, furnish, fit out, or arm," for the prohibited



purpose. I say that the Legislature gives no licence to builders here. There is not the least trace of any intention to permit builders, from any peculiar favour to their trade, to do things which other people may not do ; but, inasmuch as they were not the specific class of persons against whom or against whose part in the matter this Act was primarily directed, it was thought enough to put in words which would meet the case of every ship meant to be prepared to take the sea for the prohibited purpose ; and I can easily imagine, though that is, after all, a speculation, that there might be a further object in omitting the word " build," which would be this—to preclude the question of what I may call the builder's intention. Your Lordships may recollect that in the American case of the "*Santissima Trinidad*," it was held that the builder was quite at liberty, as an article of merchandise, to build a ship, and not only to build it but to arm it and equip it, and to take it abroad with a crew, capable of serving with it in the service of a foreign state, provided always, that as a matter of fact it appeared that, as long as that ship was within the jurisdiction, the builder was merely dealing on his own account, not for purposes of war, but for purposes of merchandise ; meaning to carry the article across the sea as he might carry powder or guns, and to take his chance of getting a profit in the country of one of the belligerent powers. Whether it would have been wise to prohibit that or not is not the question. It was not held to be prohibited, because there was an absence of intent on the part of any person having the control at the time that the ship should be employed in any belligerent service. The builder did not mean to employ her himself, and to make war with her himself ; and he, of course, had no control over the remote and contingent intention which might be formed at a future time out of the jurisdiction by a foreign potentate who at that time had not acceded in any way to the design. In a case of that sort, which is a very improbable case——

*Mr. Baron Channell.*—I understand that in that case the builder built the ship upon his own speculation ; he did not intend that it was to be employed in the foreign service, and nobody's intent was to be inquired into.

*Mr. Attorney General.*—Precisely, my Lord ; it was held that he did not intend to use her as a privateer, and he could not form an intention for the foreign prince ; and that, for that reason, it was mere merchandise. And your Lordship will find that the case of the ship "*Brothers*," one of the cases which I shall hereafter refer to, and the case of the ship "*Alfred*," which are printed in the Appendix, are two converse cases, which illustrate the same principle ; those were cases of the sale of ships in the United States to a belligerent power, ships previously fitted out for war, but with a lawful purpose, at a time when it was supposed that war might break out between the United States and Great Britain. Those vessels were prepared to be used lawfully as privateers, and the expected war not taking place the ships remained on hand fully equipped and armed. It was held that the sale was lawful, because the preparations had not taken place, and the

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

article had not been put into the condition in which it was, with the prohibited intent ; the one sale was within the neutral territory ; the other sale was at Buenos Ayres, but the principle is the same. I suppose the Legislature may have been of opinion that it was so unlikely that any great mischief would arise from the building of such ships on mere speculation, without any previous concert with a foreign power—without the accession of any intent which could be called warlike, capable of determining the intended employment of the vessel,—so unlikely that it would take place to the extent of requiring interference, that it was not thought desirable to raise such questions with ship-builders ; and for that reason, to avoid raising that question, which might perhaps have been raised if the word “ build ” had been put into the clause, it may have been omitted. And I may observe that although it may be thought the principle of the Act would have justified the prohibition of transactions of that kind, either building on speculation with a view to sell abroad or the selling of a ship ready built and ready equipped and armed in this country, yet it is not difficult to perceive that this was a remote and improbable evil which the Legislature might well think it was not necessary specifically to provide against ; because it is obvious, that, if there were really no concert with the foreign power, no accession of that foreign power to the transaction beforehand, then peace might take place before a market had been found for that ship, and there would be questions of price, and the man having the article on his hands, and there being no contract, of course he could not command his own price. And then there is the further difficulty of carrying contraband to be sold abroad. All those things make it not very likely that ship-builders would go to the great expense and incur the great risk of building ships of that kind on mere speculation ; and I am not aware, in point of fact, that it has been found to happen. Whether or no that was the reason of the omission I cannot tell. All I venture to say is this, that the builder not being the person whose intention would be the governing intention, in the cases struck at by the Act words were used which would not be separately and exclusively applicable to the builder, but which would be equally applicable to the person having the governing intention, and to all persons accessory to and having a participation in that intention. I have said, my Lords, all that I have thought it necessary to say upon the absence of any provisions against sale ; and I will not do more than make one remark upon the argument which has been urged, to which Mr. Baron Pigott has just referred, that there must be a ship already in existence, because the ship is to be forfeited ; I think it would be a very unnecessary construction of this Act to say that, though it would not make much difference in the result, according to my view, whether it be so or not. I think that the liability of the ship to forfeiture would have reference to the condition in which it was found, however imperfect. It is clear that the Act aims at prevention and not at punishment. It would be a most singular construction to suppose that the Act intended that you should

wait till the ship approached to any particular stage before the prevention could be applied. It is enough if you find evidence of an attempt or endeavour to do that which, if completed, would result in an equipment within the Act. It seems to me, that you seize whatever you find. It is the "ship or vessel," and it may be a ship or vessel in an imperfect state and condition. But, it is not really important that a different view should be taken, because we are not dealing, and never shall be dealing in cases of this sort, with circumstances in which it would be possible for the jury to come to the conclusion that a mere hull, a mere block of wood put together without any equipment, fitting, or furniture was to be the result of the transaction in this country. It is quite clear in this case, and quite clear in every case, to which the Act can possibly be applied, that the intent and endeavour is to get up a vessel in a condition to take the sea before she leaves this country, which she cannot be without some fittings, furniture, and equipment; and therefore, in truth that point is an idle one, and can never arise.

ARGUMENT.

4th Day.

I will now turn to the only other argument upon the language of the Act, which I heard from my learned friends, which appears to require an answer; and which I think made some impression as one deserving attention, (I mean no more,) upon some of your Lordships; that is to say, the argument derived from the language of the 8th section. I think your Lordships will find that to be an argument which rather recoils upon the other side. The 8th section is applied to a totally different purpose; it regulates the limits of the hospitality afforded in this country to existing foreign vessels of war, and it regulates that to this extent; it cuts it down to those things which cannot be brought within the description of augmentation of force, or addition of any equipment for war. By the universal practice of all mankind, ordinary hospitality for common affairs, for repairs and additions to that furniture which is necessary for the common purposes of navigation, is in all countries during war allowed, under regulation, to the ships of war of foreign nations; and the object of this section is to cut that down within the narrowest limits consistently with the received practice of nations,—narrower than those of the American Government,—for I observe the words are "equipped for war," not, as they say, "solely applicable to war."

*Mr. Baron Channell.*—The word "solely" is only in the American Act.

*Mr. Attorney General.*—Yes; so that if it is for war—if it is an equipment which answers a warlike purpose, it is prohibited here, though in one sense it may be *incipit usus*, and capable of being used for peaceful purposes. That seems to be illustrated by the note of the judgment in the "*Oreto*"; where the question raised was, whether certain blocks were meant for a warlike or peaceful purpose; and it appears to have been held, that, if it had been proved as a matter of fact that they were for warlike purposes, it would have been an addition to the equipment for war: and in some of the American cases, if port-holes are added to a ship, that is treated as an addition to the equipment for war, provided that

ARGUMENT.

4th Day.

as a matter of fact they are meant for warlike purposes. I conceive that this is therefore a stringent regulation, cutting down the hospitality ordinarily afforded to existing ships of war of a belligerent country, so as to exclude everything which might increase the warlike force or power of the belligerent nation. Then, because the words "any equipment for war" are used there, which are not used in the 7th section where "equipment" is spoken of, (and that, I think, is an argument at once to the contrary,) are you to infer that because the Legislature strictly prohibited anything being done to existing lawful ships of war belonging to a belligerent which could add to the warlike force of those ships, therefore the Legislature meant to permit the creation of ships of war for a belligerent, provided they were not made in a state absolutely perfect for all the purposes of war? That is the argument. Observe the difference between making equipments for a new ship of war, only not completely equipping it, and adding equipments of war to an old ship;—the least addition to an equipment of an existing ship is prohibited, and yet it is gravely argued that you may do everything but complete the original equipment of that, which, when equipped, will be a new ship of war; so that though you may not put into an existing ship of war a single gun, or cut an additional port-hole, or make an existing bulwark stronger, yet you may do all but bring into a condition to commit hostilities a new ship of war, adding to the navy of the belligerent a man-of-war like the "Alabama," taking the seas, only without her guns and without those equipments which are exclusively warlike. That is the argument. Is that reasonable? Does it not appear quite clear that the policy of the two sections is consistent? The 7th says that you shall not equip or attempt to equip a new ship of war for a foreign government. The 8th section says that you shall not increase the force of an existing ship. The two are quite consistent, but the 8th only addresses itself to the common comity of nations, by permitting additions to existing ships, which have not come into existence by any abuse of our neutrality, but which had a previous lawful existence by which they are entitled to be recognized in all other countries. We say, We will not refuse you common hospitality, but we will not let you have anything which shall make you more powerful for war than you were before. Do you mean to say that by permitting "Alabamas" to go out, though not completely equipped, you are not making the belligerent more powerful for war than he was before? Is it gravely to be said, You may give them a whole new ship of war, minus the pivot plate, but that you may not put a pivot plate into an existing ship of war? It would be a strange state of things indeed, if that were the proper interpretation of the Act.

Now, my Lords, I think I might, perhaps, again, in connexion with that subject, remind your Lordships of the species of regulations under which we give international hospitality to the ships of war of foreign countries. I said that our own orders upon the subject applicable to this war are printed at page 717 of Wheaton. You have a note of them already, but I think, in connexion with

this part of the argument, they might be again referred to. I think, according to the authorities of the United States, the addition to a gun-boat more weakly built—

ARGUMENT.

4th Day.

*Mr. Baron Channell.*—What do you understand by the meaning of the word “such” in the 8th section? I have no difficulty in understanding the interpretation you put upon the 8th section, but the word “such” would seem to refer to the ship, which is within the category of the 7th section, and no other. “And be it further enacted, That if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of His Majesty’s dominions beyond the seas, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, shall by adding to the number of the guns of such vessel;” then the only vessel that it immediately refers to is a vessel such as is described in the 7th section.

*Mr. Attorney General.*—I think, undoubtedly, it is very awkwardly expressed, but it must be referred to what follows: “or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war or cruiser, or other armed vessel, which at the time of her arrival,” and so on—the word comes by anticipation—

*Mr. Baron Channell.*—It is not very clear, and it may mean that.

*Mr. Kemplay.*—If your Lordship will refer to the corresponding American Act, you will see that they have inverted the order.

*Mr. Attorney General.*—That would be the construction to be put upon it; but it would have been better, perhaps, if we had adhered to the American order. I will not say it stands to reason; I do not want to assume anything *à priori*, but I think if you will read the clause you will find proof that that is its meaning. “If any person shall by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting.” You have not come to the accusative case yet; and, therefore, the subject of those Acts has not yet been described, “the warlike force of any ship or vessel of war or cruiser, or other armed vessel.”

*Mr. Baron Channell.*—I think so; it seems to be out of its proper place.

*Lord Chief Baron.*—It means “by adding to the number of the guns of such vessel” “as hereafter mentioned.”

*Mr. Attorney General.*—No doubt; it is more a Latin than an English way of arranging the sentence. We know that in the Latin language nothing is more common than that that which is subsequent in order of sense should be first in the order of the words, and it is so here, though it is not very common in

ARGUMENT.

4th Day.

the English language. I think your Lordships will find that even under this clause, according to the American decisions, the addition to a gun-boat constructed with weaker bulwarks, of such strong bulwarks as the "Alexandra," had for war, would have been an offence. Your Lordships will judge of that when I come to those authorities.

I do not think much of my case turns upon any arguments *ad hominem* in this case. My learned friend Mr. Mellish anticipated that I should take some advantage of the variance there has been in the different arguments presented on the other side. I do not want to place any reliance upon that; at the same time I am encouraged in my view of the unsatisfactory character of this argument by the fact, that we have had different constructions offered on the part of the claimants on the trial and now; and, on the whole, we have had four distinct constructions, the only two offered at the trial being entirely given up. Perhaps I ought to correct myself. I am not sure that my learned friend, Mr. Mellish, did not argue at the trial as he has argued here. My learned friend, Sir Hugh Cairns, certainly did not. At the trial, Sir Hugh Cairns submitted these views,—first, that the words "equip, furnish, and fit out" might be applied *reddendo singulo singulis*.

Lord Chief Baron.—That was given up.

Mr. Attorney General.—I know your Lordship did not adopt that view.

Lord Chief Baron.—He gave it up, and at the time that that discussion took place there seems to have been a great misapprehension. I understood the learned Attorney General to agree with me that all the words meant the same thing.

Mr. Attorney General.—I am sure your Lordship entirely misunderstood him.

Lord Chief Baron.—I am sure of that.

Mr. Attorney General.—It was very unfortunate that any such misunderstanding should arise.

Lord Chief Baron.—Yes; but it would be as well when a discussion of that sort arises between counsel and the Bench that there should be a more distinct expression of difference of opinion.

Mr. Attorney General.—If your Lordship will excuse me for saying so, I am sure you must have failed to convey to the Attorney General's mind the meaning you desired to convey.

Lord Chief Baron.—After all I merely expressed that at that time as an opinion which I might review afterwards.

Mr. Attorney General.—I do not think the learned Attorney General understood your Lordship as inviting any expression of opinion from him upon the subject, but merely throwing it out as a matter for consideration.

Lord Chief Baron.—It is very much to be regretted, and, generally speaking, if it is intended to tender a bill of exceptions, or to take any exception to the ruling, it is better to do that while the matter is in hand.

*Mr. Attorney General.*—Your Lordship is well aware that we intended so to do ; but, all persons acting in equally good faith at the time, it was thought not necessary, and I think it was from your Lordship that that suggestion proceeded.

ARGUMENT.

4th Day.

*The Court adjourned for a short time.*

*Mr. Attorney General.*—I was first going simply to enumerate, without much comment upon them, the constructions which had been advanced by my learned friends ; and, as was stated by the Lord Chief Baron, the first I mentioned was advanced tentatively, and was given up ; the second, insisted upon by Sir Hugh Cairns at the trial, but which he did not repeat here, was that this clause was only directed against English privateers ; that is, where Englishmen were concerned, and were going to carry on war upon their own account. I have not heard that argument repeated here, and I am not at all surprised at it ; because it is very obvious that the language of the Act does not point to a distinction of that sort ; and it would be inconceivable that that could be the object of it, to allow a foreign belligerent power to do what is described in the clause, and only to provide against English privateering, which would be, one would imagine, an offence against the common law. But so far as this Act gives additional sanctions and imposes additional penalties applicable to the case of English privateers, it is perhaps not entirely unworthy of observation that the whole scope of my learned friend's argument, if it were successful, would be to permit English privateers, as well as foreign ships, to be fitted out within the realm to the extent they contend for ; that is to say, so long as the armament was not complete, the equipment not distinctively warlike, and the ship not immediately in a position to commit hostilities, both English privateers to carry on war on their own account, and ships fitted out on the account of foreign Governments, would be in the same situation. I suppose, also, their argument would go to this length, that the Confederates might if they pleased buy up a large ship-builder's yard in this country and establish a dockyard there of their own and make ships upon any scale, provided they did not bring them into that state of distinctively warlike equipment, which my learned friend's argument suggests to be necessary. The third construction contended for is that which I have been dealing with throughout the argument, which I understand my learned friend Sir Hugh Cairns to have contended for here on the present occasion ; namely, that some equipment of a distinctively warlike character is necessary. I have already dealt with that, and I will say no more upon it. My learned friend, Mr. Mellish, indicated a disposition to depart from that, and he went the whole length of saying, as I understood him, that even an equipment of an exclusively warlike character was allowed, provided always that the ship when it left British waters was not in a condition to commence actual hostilities,—in other words, (the argument can mean nothing less,) that arming

ARGUMENT.

4th Day.

within the realm is necessary as well as the rest; because the argument of my learned friend seems to me to be unintelligible, and nothing that falls from him ever is so, unless it goes that length. I have dealt with that also, and I do not mean to repeat what I have said.

I wish to trouble your Lordships a little with such authorities as we have, and they are indeed exclusively from the United States; but, bearing in mind the just observations which fell from the Bench yesterday as to the only purpose for which those authorities could properly be referred to, and of course not being for a moment under the impression that they can be authorities directly governing the construction of an English statute, yet I refer to them as decisions of men skilled and learned in the law—always spoken of with respect in this country upon matters which, when examined, are found to be more or less *in pari materia*, and entitled therefore to that degree of weight due to the decisions of such persons, and which they have often received from the Bench here. Before, however, I refer to any of those decisions, your Lordships will permit me to give you an example and illustration, perhaps it may be no more, but at all events a useful example, coming from a source of considerable authority, as to what may be included within the meaning of the word “equipment,” viz from the treaty between Great Britain and the United States of 1794. In the 18th article of that treaty there is a convention between the two countries as to what between them shall for the future be considered to be contraband of war. Of course there are mentioned arms and everything of that description and all implements of war, as also timber for ship building, tar or rosin, copper in sheets, sails, hemp, and cordage, “and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted.” Now, that observation may not be entitled perhaps to very great weight, but I think it is entitled to some, that fir planks would enter into the structure of the ship, and they are spoken of as things serving directly to the equipment of vessels; serving as an example of the use of the word “equip,” which may comprehend things that enter into the structure, whether it comprehends the entire structure or not. In this case I should think it would be applicable to such things as the bulwarks and other things. And your Lordships will recollect one or two cases in Bee’s Reports which my learned friend Sir Hugh Cairns mentioned, which appear to me to show that such a view has always been taken in the United States upon the construction of their statute. There is the case of the ship “Mermaid,” in Bee’s Reports, page 69, the British Consul against the “Mermaid.” It was, like all those American cases, a case of restitution of prize on the ground that the ship which took the prize had been fitted out or had her force augmented within the United States unlawfully and in violation of their neutrality laws. At page 70, we have this statement: “The second ground of libel is, that she,” that is the captured vessel,



" was fitted for war in Charlestown." This is the judgment of the Court, which I am reading from, " From the evidence as well " as from the acknowledgment of the party there cannot be a " doubt that this vessel underwent a material alteration previously " to the change of ownership. Her quarter deck was taken away, " all decayed timbers and planks repaired, her ports opened, " and other work done. By whom, then, at what time, and with " what intent those alterations were made, and under what penalty, are all material questions upon the determination of which " the cause must turn." Well, my Lords, if those were not works coming within the description of the prohibited things, fitting out and so forth, I apprehend they would not have been material questions. The Court, examining those questions, found, as a matter of fact, that all this was done when the ship was American property, before the change of ownership, and when there was no contemplation of any breach of the law; and in fact the case resolved itself merely into the question, whether, the ship having been brought into the condition in which she was, lawfully, and not for the prohibited purpose, and in fact before the Act of Congress had passed, whether the American owner was to have his property laid up and rendered useless, because she had been preparing for war, between his own country and Great Britain, at a time when it was not merely lawful but laudable? It was held, that it having been done with that laudable intent, for the defence of his own country in time of war, he was warranted in selling her afterwards, and that such a sale was lawful; but the Court obviously considered that if those things had been done afterwards, and in order to prepare her for employment in the service of another belligerent, that might have been a sufficient ground for the condemnation of the ship.

The other case of the ship " Brothers," mentioned by my learned friend, Sir Hugh Cairns, to your Lordships, and which follows the " Mermaid," almost immediately in the same book at page 76, will, I think, tend to illustrate the same principle. That was a case of augmentation of force. The ship was already a complete privateer when she first arrived in the country, and it was held to be, therefore, only a case under the section which related to augmentation of force; that was, an addition of equipment solely for purposes of war; that was the language of the statute. The ship, according to the evidence, being an armed vessel when she arrived, and being repaired, two new ports were said to have been cut in her, and the Court examined that, obviously, upon the supposition that if two new ports had been only cut in the ship, in order to give her increased power for war, by the cutting of those ports the case would have been brought within the Act. But, upon examining the evidence, it is found that, upon the result of it, all that was made out was, that two of the ports in the waist were altered; and the Court says this would not amount to any additional equipment, nor could it be considered a breach of neutrality, their Act only dealing with such alterations as augmented the warlike force: and in the

ARGUMENT.  
4th Day.

ARGUMENT.

4th Day.

opinion of the Court, as a matter of fact, these were not two new ports cut *de novo*, but a mere alteration not augmenting the force. These two instances seem to show the view as being clearly entertained, that changes of that sort, though affecting the structure of the vessel, nevertheless would be within the meaning of the terms "equipment" and "fitting out" in the interpretation of that Act.

There is another case which was mentioned by my learned friend, Sir Hugh Cairns, in which I observe that practically much the same view was taken and acted upon; although there seems to have been no judicial decision on the point. It is the case of the *United States and Guinet*, in Wharton's State Trials, at page 95. It appeared that a ship having come into port with a certain amount of armament, and a certain number of port-holes, ten, I think, on each side, at the time of her arrival, and with four guns and two swivels, after she came into port she was put into the hands of a ship carpenter to repair, and "the ship carpenter declared that he would open the number of ports (20), which were pierced when she came into port; there were 20 pierced, but only four actually open. The ship carpenter declared that he would only open the number of ports (20), which were pierced when she came into port, and in all other respects fit her for a merchant ship;" "the twenty ports being opened, and the other repairs of the vessel proceeding rapidly, the Government instituted an inquiry into the subject, in order to ascertain the nature and design of her equipments. On examination, the Master Warden found the vessel in great forwardness; her 20 ports open, her upper deck changed, &c., and four iron guns on carriages with two swivels, were lying on the adjoining wharf." She had mounted, when she came in, those four guns and two swivels. "He therefore desired the carpenter to desist from working any further on the vessel, and made a report on the subject to the Secretary at War, who directed that all the recent equipments of a warlike nature should be dismantled, and the vessel restored to the state in which she was when she arrived. The Master Warden accordingly caused the portholes to be shut up, and even refused to allow any ring bolts to be fixed in the vessel. A few days before she left the port a witness said he saw four guns in her hatchway; the carpenter who repaired her said she carried with her from the wharf the four guns and two swivels that she had brought in, and according to the Custom House entry, she sailed from that city in ballast, having nothing in her hold but provisions, water casks, and wood for the ship's use." She had been a merchant vessel when she came in, and what was done to her was done with the purpose of adapting her to war. You see that the port-holes were ordered to be shut up, the ring bolts were not permitted to be fixed, and then afterwards, when she was at Wilmington, because a few additional guns had been put on board, it was held that there was a fitting out and arming, and the person who had acted as interpreter was convicted. It does not

go very far, because it may be that the taking of additional guns on board was enough to justify a conviction of itself. But I think the facts I have read will tend to show what was the understanding which was always acted upon by the Government of the United States, with respect to the meaning of the words "fitting out," and "equipment."

Then, my Lords, there is the case of "The United States and "Quincy," reported in the 6th Peters, which has been already mentioned to you. That case seems to me to rule directly and distinctly the very point which we have been arguing and discussing. I am sure your Lordships must recollect the case. Besides being reported in the 6th Peters, it is also printed in the Appendix to the Report of the Trial in this case. It arose upon an indictment against the defendant for a misdemeanor created by the American Act. He was not indicted as the principal, he was indicted as being "knowingly concerned in fitting out." And your Lordships will recollect that there was that passage in the judgment which has been referred to, as to the disjunctive occurring in that part of the definition of the offence, when the conjunctive occurs elsewhere.

Your Lordship has suggested an interpretation of that which in itself would be a perfectly sound one, but which I do not think is reconcileable with the decision as reported in the book; I mean that if fitting out and arming conjunctively, constituted the principal offence, a man who assisted in any part of that principal offence, whether it were in arming or fitting out, would be justly chargeable as an accessory to it. Every one must see the reasonableness of that view; but in point of fact the decision did not proceed upon that ground; it proceeded upon this ground, that each offence is distinct and substantive, that it is not to be regarded as a case of principal and accessory, and that since the United States had chosen in their legislation to say a man shall not assist in fitting out or arming, whatever difficulties there might have been in dealing with a conjunctive, as to which the Judge seems to have felt doubt, in the indictment of a principal offender, those difficulties did not arise upon that class of cases. Of course, my Lords, I am not going to argue before your Lordships a point so irrelevant to the present discussion as the question, whether in that respect the United States Court gave a judgment which your Lordships would be likely to follow in a similar case or not; because we should never forget that our statute does not raise that difficulty. We have the disjunctive throughout. I think the true conclusion to arrive at is, that, rightly or wrongly, the learned Judge thought the copula "and" might be construed as if it were a disjunctive throughout the whole of that Act. Whether I am right in that supposition I cannot tell.

But what was it that was specifically determined as the main point in that case? It seems to me that it is a determination directly in favour of the view which we take of the effect of similar words in our Act, which does not present the difficulties

ARGUMENT.

4th Day.

ARGUMENT.  
 4th Day.

which that Act did. Observe what was the evidence in the first place. My learned friend, Sir Hugh Cairns, referred to it to suggest an interpretation, which I will presently show is utterly untenable, of the judgment. The evidence was this. "Evidence was given of the repairing and fitting out of the schooner 'Bolivar,' in the port of Baltimore, in 1827. That she was originally a Maryland pilot boat, of 60 or 70 tons. The work was done at the request of Henry Armstrong and of the defendant, who superintended the same; that she was fitted with sails and masts larger than those required for a merchant vessel, and was altered in a manner to suit her carrying passengers, and with a port for a gun." That was what you may describe as a structural alteration. Then it appeared that she sailed for St. Thomas, having on board provisions, 32 water casks, 1 gun carriage and slide, a box of muskets, and 13 kegs of gunpowder, and a bond was given not to commit hostilities. My learned friend referred to that, and said the gun carriage and slide, and the 13 kegs of gunpowder, and the box of muskets, might have been regarded as an arming of the ship; to which my answer is, that whether it might have been so regarded or not, the point of law ruled in that case did not turn upon those facts, but excluded them, because your Lordships will observe that this was the point of law, and the way it arose. It seems to be the practice of the American courts to enable points not merely to be determined at the trial subject to subsequent consideration, but to be sent while the trial is going on, (the trial I suppose being adjourned,) by way of a case or reference, to the superior courts for their direction. And in that case the defendant moved the Circuit Court for their opinion and direction to the jury upon four points, which are expressly mentioned in the report. The District Attorney of the United States, on the other hand, also moved for four directions to be given according to his view, and the Court determined between them. This is the material point, what were the directions which the Court said ought not to be given, and what were the directions which the Court said ought to be given? The first direction moved for by the Defendant, which the Court rejected, was in these terms, "The Defendant moved the Circuit Court for their opinion, and direction to the jury, that if the jury believe that when the 'Bolivar' left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, she was not armed or at all prepared for war, or in a condition to commit hostilities; the verdict must be for the traverser." The Court said that that direction was not to be given; in other words, that it would not be a correct statement of the law upon their Act, that if the jury believed that the ship was not armed, and that she was not prepared for war, or in a condition to commit hostilities, it would not be correct to say that that entitled the Defendant, even upon an indictment for a misdemeanor, to an acquittal. Now, what was demanded by the District Attorney

of the United States? "First, that if the jury find from the evidence that the traverser was within the district of Maryland, knowingly concerned in the fitting out of the privateer 'Bolivar,' with the intention that the said vessel should be employed in the service of the united provinces of Rio de La Plata to commit hostilities, or to cruize and to commit hostilities against the subjects of the Emperor of Brazil, then the traverser has been guilty of a violation of the third section of the Act of Congress, although the jury should further find that the equipments of the said privateer were not complete within the United States, and that the cruize did not actually commence until men were recruited and further equipments were made at the island of St. Thomas in the West Indies, and should further find that the 'Bolivar' on her way from Baltimore to St. Thomas had no large gun, no flints, nor any cannon or musket balls, and that the muskets and sabres were during the voyage nailed up in boxes." The Court found that this direction ought to be given; and there was a long argument with which I am not going to trouble your Lordships. But, at page 445 in the 6th Peters, the Court said "This varied phraseology in the law was probably employed with the view to embrace all persons, of every description, who might be engaged directly or indirectly in preparing vessels with intent that they should be employed in committing hostilities against any power with whom the United States were at peace." And shortly afterwards, "We are accordingly of opinion that it is not necessary that the jury should believe or find the 'Bolivar,' when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas was armed, or in a condition to commit hostilities in order to find the defendant guilty of the offence charged in the indictment." That appears to me to be a direct finding, supposing their Act was *in pari materia* with ours, against the argument which has been addressed to your Lordships by my learned friend. Then they go on to say that other instructions ought to be given. "The first instruction, therefore, prayed on the part of the defendants must be denied and that on the part of the United States given;" and other instructions are given as to whether the intent must be a fixed intent or one contingent and uncertain, which was determined in the defendant's favour.

There is another case which I will ask your Lordships to allow me to refer to, not upon the same statute, but, I think, involving similar principles of construction. The American statute to which I am now going to refer, upon which this question arose, is chapter 91 of the Acts of 1818; it is dated the 20th April 1818; and in the collection of public statutes at large of the United States, edited by Mr. Peters, volume 2, at page 450, your Lordships will find that statute; it is one of their Slave Trade Acts.

*Mr. Baron Bramwell.*—Allow me to ask with respect to that

ARGUMENT.

4th Day.

case of Quincy, it has been very much relied upon, but it seems to me a little inconsistent with an opinion of your own as I understand. Do I rightly understand you to say that upon our statute it must be conceded that there cannot be one offence committed by the subordinate, the assistor, unless there is a principal committing the offence which this statute forbids him to commit? I have understood you to say that unless an offence has been committed by a principal within the Act of Parliament, nobody can be guilty of assisting within the Act.

*Mr. Attorney General.*—I think certainly that unless something is done, or intended to be done, within the realm, which, if committed, would come within the words equipping, furnishing, fitting out, and so on, nobody can be assisting in doing it.

*Mr. Baron Bramwell.*—But you see Justice Thompson, who gave the judgment in this case, seems to think differently.

*Mr. Attorney General.*—It is so; I quite agree to that. I am very far from saying that my opinion is necessarily right. I do not wish, in the position in which I stand, for the argument's sake merely, to dissemble my opinion; that is the opinion I have formed, upon the English statute.

*Mr. Baron Bramwell.*—I think that is a very important matter; because the case of the United States against Quincy has been often referred to; I do not mean in Court, but elsewhere. And we cannot disguise from ourselves the importance of appearing to neglect that authority. It has been referred to as an important authority and as satisfactory. I confess that, to my mind, it is a very unsatisfactory case. It seems to me that the reasons given by the learned Judge for his opinion, are very insufficient indeed. He says, if the objection were well founded, it ought to state that the defendant was concerned in fitting out, the "Bolivar" being a vessel fitted out and armed. He then goes on, "It is sufficient if the indictment charges the offence in the words of the Act." That has been tried over and over again in cases where the words of an Act which have been put into the indictment have been found to contain a different meaning from that which they do when read in the Act with all the surrounding words—that is one bad reason. Another is, that the objection of the defendant was not that the indictment ought to have said that the "Bolivar" was a vessel fitted out and armed; but the objection was this: That the "Bolivar," being a vessel intended to be fitted out or armed, or which certain persons were intending to fit out or arm, he, the defendant, assisted. He does not say, I cannot be guilty of assisting unless the vessel was actually fitted out or armed; but what he said was, I cannot be guilty of assisting in either of two acts, both of which are necessary to an offence, unless both of those acts were contemplated by the parties whom I was assisting. I own I think this judgment is a very unsatisfactory one.

*Mr. Attorney General.*—I confess I think it open to the particular criticism which your Lordship has just made upon that part of it; but I do not think that need necessarily affect the principles laid down in the remaining part of the judgment.

*Mr. Baron Bramwell.*—No, truly as you say, what they held in that case was practically this, for inasmuch as they had the evidence before them, I take it that it may be said that they practically held that the case would be within the statute, although the vessel was not in a belligerent condition, or in a condition to commit hostilities at the time of her leaving the port.

*Mr. Attorney General.*—Yes, my Lord, I refer to it for that only, not dissembling from myself that the authority of the case is liable to the deduction his Lordship has spoken of; that another point was ruled in it which I should not be prepared to insist upon it as actually ruling any similar case here. The reasons for that ruling may not seem to be entirely satisfactory.

*Lord Chief Baron.*—You mean with respect to the fixed intention?

*Mr. Attorney General.*—No, my Lord. I mean with regard to the accessory and the principal, if those terms may be used; remembering that, in another sense, every offender under the Act is a principal. It seems to me that you may divide the points determined in that case into three. First of all, a point of form,—not of form ultimately, but a very substantial one,—the question whether there must be an intention to fit out and arm the ship within the jurisdiction in order to bring in a person as accessory under the clause; and it was ruled there that it was not necessary that it should be so, because, even supposing both acts must concur in the principal, either would do in the accessory; not according to the view which your Lordship has suggested, which would be intelligible, but according to another view which is not to my mind, any more than it is to your Lordship's, entirely satisfactory.

*Lord Chief Baron.*—I am glad to hear you say that, because if one knew the decision without the reasons for it, it might be of more authority than it is now; and I confess, accompanied with those decisions, it makes me feel very much doubt of its value, although we must no doubt take it as of some value. There was a case to go to the jury, although that which was intended and attempted to be done was something short of putting the vessel into a warlike condition at the time.

*Mr. Attorney General.*—The decision upon the point for which we refer to it may, as it seems to me, be kept separate from the rest, subject to the observation, that if there was any point not correctly ruled in the case, it, in some degree, detracts from the authority; but on this branch of the clause they said in substance "We are entitled to read it just as if the word 'or' were used 'instead of 'and'" throughout, and for that purpose I refer to it. I do not think there is anything to impeach it for our purpose more than this, that any points which were incorrectly decided may in some degree detract from its general authority. I will ask your Lordships, also, to bear in mind that this case contains traces of what is always an unsatisfactory proceeding on the part of a Court, an avoidance of part of the question; because it is not at all clear that the Court were prepared to agree that the word "and" was to be construed in that sense, which seems

ARGUMENT.

4th Day.

ARGUMENT. to be its more natural one in the American Act, requiring the concurrence both of fitting out and arming in every case for the principal offence.

4th Day.

Then observe, these are the remarks made by the Court upon that subject at page 464. "On the part of the defendant it is contended that the vessel must be fitted out *and* armed, if not complete, so far at least as to be prepared for war, or in a condition to commit hostilities. We do not think this is the true construction of the Act. It has been argued that although the offence created by the Act is a misdemeanor, and there cannot legally speaking be principal and accessory, yet the Act evidently contemplates two distinct classes of offenders,—the principal actors who are directly engaged in preparing the vessel, and another class who, though not the chief actors, are in some way concerned in the preparation. The Act in this respect may not be drawn with very great perspicuity, but should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit) it is not perceived how it can affect the present case." The Court seems, therefore, to have thought that although the letter of the Act might seem to favour that view, and to require that you should have the arming in every case, as well as the fitting out, it had not been so understood and acted upon. That if it were necessary to decide that, they might have found the means of deciding that otherwise: but they pass on and say, that is not necessary, because the other clause is disjunctive. I submit to your Lordships that nevertheless upon the other point the case may well stand as a good authority notwithstanding that.

I now ask your Lordships to allow me to mention the other authority. It is not upon the same Act, but is upon one of the American Slave Trade Acts, to which I think I gave your Lordships a reference.

*Mr. Baron Bramwell.*—Allow me further to put this. It has been said that this case is an authority in point in the present case, that it is entirely satisfactory, and that it is owing to something like bad faith that it has not been properly cited and relied upon.

*Mr. Attorney General.*—I should be very sorry to say that.

*Mr. Baron Bramwell.*—You do not say so, Mr. Attorney.

*Mr. Attorney General.*—No, but I think your Lordships must be very well aware in this country of the existence of numerous cases, in which the doctrine which has been laid down upon a certain subject has stood perfectly well, although other points determined in the same case are not so supported; and if I may venture to say so, it seems to me that the Court were in so great a hurry to travel there to what they thought the substantial question, that they do not go by quite a satisfactory road in that journey, that is all. I was going to refer to the other book which I mentioned, a case which arose upon one of the American Slave Trade Acts. The Act contains large words. It prohibited under penalties, including the condemnation of the



vessel, any "citizen or citizens of the United States, or any other person or persons," from doing these things; no such person "shall for himself, themselves, or any other person or persons whatsoever, either as master, factor, or owner, build, fit," I rather think the word "out" has slipped out there, for I find it everywhere else "fit out, equip, load, or otherwise prepare any ship or vessel in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negro, mulatto, or person of colour from any foreign kingdom, place, or country, to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as slaves, or to be held to service or labour; and that if any ship or vessel shall be so built, fitted out, equipped, laden, or otherwise prepared for the purpose aforesaid, every such ship or vessel, her tackle, apparel, furniture, and lading shall be forfeited." Now, take the word fit out; a ship was not to be fitted out for the purpose of procuring negroes to be transported and sold as slaves. An indictment was framed upon that Act, and a case upon it is reported in the 12th Wheaton's Supreme Courts Reports, at page 460; the *United States v. Gooding*. The indictment was framed upon that Act, the first count of which charged fitting out alone; that Gooding, being a citizen, and so forth, did on a particular day "fit out for himself as owner in the port of Baltimore, within the jurisdiction of the United States, a certain vessel called the 'General Winder,' with intent to employ the said vessel in procuring negroes from the continent of Africa to be transported to Cuba, contrary to the true intent and meaning of the Act." There were other questions with which I need not trouble your Lordships. A question arose upon that count, which charged him with fitting out, only, this schooner with intent to procure negroes, &c. Instructions were given, or rather were asked for, of which the third, mentioned at page 466, was this: It was demanded by the defendants, they moved the Court for its opinion upon those points. The third instruction was this, "That the first count charges a fitting out in the port of Baltimore, which, according to the true legal interpretation of the words in an indictment, means a complete equipment, and that evidence of a partial preparation here, and a further equipment at St. Thomas will not support the charge contained in the count." Then the judgment of the Court, upon that instruction, is expressed in these terms at page 472: "The third instruction turns upon the point, whether the fitting out, in the sense of the Act of Congress, means a complete equipment, so that a partial equipment only will extract the case from the prohibition of the statute. This objection appears to us to proceed from a mistaken view of the facts applicable to the case. If the vessel actually sailed on her voyage from Baltimore, for the purpose of employment in the slave trade, her fitment was complete for all the purposes of the Act. It is by no means necessary that every

ARGUMENT.

4th Day.

ARGUMENT.  
 4th Day.

" equipment for a slave voyage should have been taken on board at Baltimore; or, indeed that any equipments, exclusively applicable to such a voyage, should have been on board. The presence of such equipments may furnish strong presumptive proof of the object of the voyage, but they do not constitute the offence. The statute punishes the fitting out of a vessel with intent to employ her in the slave trade, however innocent the equipment may be, when designed for a lawful voyage. It is the act combined with the intent, and not either separately, which is punishable. Whether the fitting out be fully adequate for the purposes of a slave voyage, may, as matter of presumption, be more or less conclusive; but if the intent of the fitter be to carry on a slave voyage, and the vessel depart on the voyage, her fitting out is complete, so far as the parties deem it necessary for their object, and the statute reaches the case. But we are also of opinion that any preparations for a slave voyage, which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out within the purview of the statute." And some earlier authorities are referred to. Now, the principles of the decision upon that count seem to me to be strongly applicable to this subject.

*Mr. Baron Channell.*—What was the order of the Court?

*Mr. Attorney General.*—They refused the instruction asked for by the defendant. I think I gave your Lordships the reference, 12 Wheaton, page 460; there were other counts and other questions with which your Lordships need not be troubled.

*Mr. Baron Channell.*—Was there in that, as in the other case, an instruction framed by the prosecutor, the district attorney of the United States?

*Mr. Attorney General.*—I think not. At page 479 I find the certificate of the opinions of the Court, first, with regard to the admissibility of evidence; then, that the opinions prayed for by the counsel for the defendants in the rest of the sixth prayer, which are not mentioned here, were correct in law and ought to have been given; that the opinions prayed for upon every other prayer were incorrect in law and ought to be refused; and fourthly, that certain objections to the form and sufficiency of the indictment were not available at the time they were taken. That seems to be the whole. My Lords, I have but one observation to make upon the reference made by my learned friend, Mr. Mellish, yesterday, to the decree of the Judge of the Vice-Admiralty Court of the Bahamas in the case of the "*Oreto*." There was no evidence whatever, as I understand it, to satisfy the Court that the ship was intended for any but a mercantile purpose, and under those circumstances that which was relied upon as the *corpus delicti* was putting on board a certain number of blocks which it was alleged were of a kind and number which could only have been intended for a belligerent object. That being the only form of proof by which the warlike purpose was to be

established, the Court of course examined it, and finding upon the evidence, pro and con, the master coming forward to give his evidence, that it was not proved that there was either a number or a kind of blocks which were unsuitable to a merchant vessel, and the rest of the evidence being held to be consistent with the intention to employ her as a merchant vessel, the case simply failed upon the evidence ; there was no evidence of intent which would satisfy the Judge, the particular equipment being not of a character to be a proof of a warlike intent, or to be in itself illegal. And your Lordships will recollect these circumstances ; the ship sailed from England fully equipped, and nothing was done in the Bahamas except putting those blocks on board ; and therefore it would be a case of furnishing, at any rate of the lowest degree ; and it would require clear proof of the illegal intent to bring furniture, which was *incipit usus*, under the Act. The furniture was itself of an innocent kind, and the employment of the vessel was not proved to be intended otherwise. No doubt the conclusion come to in that case, in such a state of evidence, was unavoidable.

I need not trouble your Lordships by going at any great length into the observations which my learned friend Sir Hugh Cairns made, which did not seem to me to indicate any great amount of confidence on his part in his case, upon the supposed negative argument arising from the fact, that, until the present time there have been no prosecutions in this country under the Foreign Enlistment Act. We know, as a matter of fact, that there have been no considerable wars ; and I presume that when the Act was passed, when the war with the South American Republics was going on, the passing of the Act had the effect of deterring the people of this country from doing the things against which it was directed. As regards subsequent applications of it, in some of the wars which have taken place on the continent since that time, we have not been absolutely neutral. And, therefore, I do not think it has been yet shown, that there have been cases which could very well have led to these questions coming forward.

My Lords, my learned friend referred to the Terceira case, which was a case turning upon the propriety of our intercepting out of our own dominions,—in truth, in the dominions of Donna Maria, whom they were intended to serve,—an expedition which sailed from Plymouth carrying unarmed troops. If the case had assumed, which it did not, a legal aspect, I should still have said that it would have been no authority whatever upon this subject ; for nobody can read the history of it without seeing that it was clear to demonstration and beyond doubt that the Foreign Enlistment Act had been infringed in that instance. Those ships were used as transports to convey a number of troops to an island which had been the subject of contest, and which was at that moment in the possession of Donna Maria ; the other islands of the Azores being in the possession of her opponent ; and it being the object of the war to recover those islands. Of course, if it is illegal to

ARGUMENT.

4th Day.

ARGUMENT.  
4th Day.

fit out a transport for troops, it does not matter whether the troops carry their arms with them or not. And therefore in the *Terceira* case, it was the starting point of the whole question, that there had been a direct and clear violation of the Foreign Enlistment Act. The only question was, whether the ship, having slipped out, the Government were justified in pursuing her and not permitting her to land her troops where she otherwise would have done. That is a question with which, I apprehend, we have nothing to do now.

Now, my Lords, I pass to the subject of the summing up of the learned Judge. I think it will be convenient that I should refer to that before I refer to the evidence, treating the question of verdict against evidence as distinct from it afterwards.

My Lords, the objections which we have to make to the direction of the learned Judge to the jury are these, that his Lordship did not explain to the jury the meaning of the Foreign Enlistment Act, except in a manner which, if the interpretation which we place upon it is correct, was an erroneous way of explaining it; and therefore that the language of his Lordship, if it does not bear our interpretation, was calculated to mislead, and doubtless did mislead the jury; and if it does bear our interpretation, it was a wrong direction to the jury; and that, under any circumstances, there was an absence of the assistance which, in the interpretation of this Act of Parliament, the jury ought to have received from the learned Judge.

*Mr. Baron Bramwell*—Before going into the particular direction of my Lord, let me see whether I rightly understand you as to the principles which you have laid down. You say that any equipment with intent that the vessel should cruise will do, whatever the character of the equipment may be, do you not?

*Mr. Attorney General*.—Yes, my Lord.

*Mr. Baron Bramwell*.—Allow me to ask you, what are we to understand as the meaning which you put upon the words, "with intent that she shall cruise?"

*Mr. Attorney General*.—Those are not precisely the words, my Lord; it is "with intent that she shall be employed in the service of a foreign government to cruise and commit hostilities." I cannot help thinking that the interval is a very important one between the words "with intent" and "to cruise." The intent is to be that the ship shall be so employed by a foreign government, not, I apprehend, that she shall cruise instantaneously.

*Mr. Baron Bramwell*.—Let me withdraw my question, which was, perhaps, a wrong one, and put it correctly; that is to say, "with intent or in order that such ship or vessel shall be employed in the service of any foreign prince" with intent to cruise and to commit hostilities; do I understand you to say that that would comprehend the intent, not that she shall immediately be employed to cruise or commit hostilities, but that after she shall have gone elsewhere, and received an addition to her equipment, she shall cruise?

*Mr. Attorney General.*—I have no doubt, my Lord, that it would cover that case. ARGUMENT.

*Mr. Baron Bramwell.*—You say that it covers that case as well ? 4th Day.

*Mr. Attorney General.*—Certainly, my Lord ; the words are not that she shall immediately be employed and cruize, but that she shall be employed in the service of a foreign prince to cruize and commit hostilities. Whatever the foreign prince does to her in the meantime to make her better fitted for that service, still she is ordered by him with the intent that she shall be equipped and fitted for that service, and she is furnished by those who intend her for such employment.

*Mr. Baron Bramwell.*—It may be not an equipment with intent that she shall at once cruize, but an equipment with the intent that she shall be employed and cruize in the service of a foreign prince.

*Mr. Attorney General.*—Yes, my Lord ; and if any force is to be attributed to the disjunctive copula which separates “arming” from the other words, as it is evident that she could not cruize till she was armed ; she might offend against the Act in other respects, although she would not be in a condition to do that. I think I have already gone through that subject, more or less.

*Mr. Baron Bramwell.*—I only wanted to have your opinion expressed as concisely as possible.

*Mr. Attorney General.*—It appears to me, my Lord, to be very important in that point of view to remember that you do not couple the cruising with the immediate intent of the person who is doing the prohibited act. What he does, is equipping, attempting, procuring, or aiding in equipping, in order that the ship shall be employed in the service of a foreign prince to cruize. That foreign prince will give the orders, and tell her where she shall cruize, when she shall cruize, and how she shall cruize ; and then, from the moment when she comes into his possession, decide what may be the additional equipments which it may be proper to give to her for the purpose of arming her. It cannot be supposed that this was intended only to touch a case where the foreign prince who orders her to be made for his purposes of war is dealing upon the footing that he is going to use her instantaneously.

At this point I think I may as well supply a vacancy in my argument, for I am now brought back upon the argument with regard to intent. I did not say much upon that before. My learned friend, Sir Hugh Cairns, has asked us again and again whom the Government have fixed upon, whose intent it was that we point to. In substance, if our argument is right, we show the intent of the Confederate States, and of their agents here ; and this makes it, upon our showing of the case, the Confederate States who are the masters of the intent, who have the intent, through their different agents in this country, agents sent over on their behalf, for their purposes, their financial agents, and agents in warlike matters.

ARGUMENT.

4th Day.

Captain Bulloch, and Messrs. Trenholm and Co., for example, and Mr. Hamilton, are admitted to be their agents : they ordered the vessel to be built as a gun-boat : of course such men intend the obvious consequence of their own acts, that she should be used as a gun-boat in the Confederate service. And the Confederates being at war, it is perfectly clear that she must have been intended to be used to cruise and to commit hostilities against the persons with whom they are at war.

Now, my Lords, I come to the charge. His Lordship began by noticing the circumstances under which the ship was seized. The charge begins in the printed book with page 227. The earlier parts I shall not be obliged to read to your Lordships at length, I only wish to show how far they throw light upon anything which follows. His Lordship began by reminding the jury that it was an information upon the part of the Crown, "following a seizure by some officers of the Government, taking possession of a vessel which was in the course of building at Liverpool, it had not been completed." That of course, nothing which is intercepted before the attempt is completed can be. "It is admitted that it was not armed." When his Lordship spoke of its being in the course of building, remembering the evidence, we know what was meant ; in common parlance, you may call every ship in the course of building while she remains with the artificers at work upon her, whether the furnishing and other fittings have been begun or not. In this case the machinery and other fittings were already on board. "It is admitted that it was not armed." And then his Lordship refers to the form of the information, and speaks of the absence of a count charging the parties with arming. And then he comes at last to the question whether the vessel, as then prepared at the time of the seizure, was an object of seizure under the Act. Then his Lordship expresses, in forcible language, the feelings common to us all of regret at the circumstances which have caused such a case to arise. And then he proceeds in this way : "Let us go at once to the business of the moment. The charge is only that there should be a condemnation of the vessel as being properly seized ; but that seizure necessarily involves the commission of a misdemeanor. And then the inquiry is and must be, was a misdemeanor committed under the terms of the Act of Parliament ? If there was, and if the ship has been seized in consequence of that misdemeanor, the information is right, and your verdict must be for the Crown. If there was not, (and I shall presently state to you what appears to me to be the question of fact you have to try,) then the information founded upon the seizure ought to have a different termination, and your verdict ought to be for the defendants." His Lordship then observes, that it is necessary that the jury should be persuaded of the truth of what involves an accusation of crime although it takes only the character of a seizure of a vessel." Of course I entirely acquiesce in that. If I may respectfully say so, I most entirely agree with that part of his Lordship's state-

ment. But his Lordship has not hitherto approached the question of the construction of the statute.

His Lordship arrives at the question with regard to the construction of the statute at page 229 ; where he says, " Now, gentlemen, with these observations I will go at once to the statute in question, and to points of fact which I think I ought to submit to you. Gentlemen, that statute is one that was passed in the year 1819, upon which no question has ever arisen in the Courts of justice, and it is here before you for the first time. But it so happens that we have expositions of the statute by decisions in the American Courts, which we very justly pay the greatest respect to. For two of the most celebrated writers upon law, Mr. Chancellor Kent and Mr. Justice Story, are Americans, and they have contributed certainly more to render law a science, and to render the pursuit of it, I was almost going to say, captivating, than any writers on this side of the Atlantic for 30 or 40 years past." My Lord, I think we shall all agree with that, at all events. But I cannot help also saying, that some of our young friends at the bar, who are rising up at the present day, and showing the fruits of the greater attention which is now being paid to legal education, appear to me to be likely to tread worthily in the steps of these American writers. His Lordship goes on ; " Now I find in the Commentaries of Chancellor Kent this statement. He says, that on certain occasions it was contended on the part of the French nation, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers, but it was satisfactorily shown on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights ; and neither party can charge the other with a criminal act. The cases that are referred to in the note are those very cases that have been mentioned at the bar ; two of them by Sir Hugh Cairns, and another, I think, by the learned Attorney General. Gentlemen, that is the expression of Chancellor Kent in his Commentaries upon American law, which are very well worth reading by anybody who cares to study law at all, even English law, because they contain unquestionably one of the best and ablest, not the worse for being the shortest, account of the belligerent rights, and the rights of nations in the very beginning of Chancellor Kent's Commentaries. Now, in the case of the ' Independencia,' Mr. Justice Story, in giving the judgment of the Supreme Court of the United States, says thus : ' But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign parts for sale. It is a commercial adventure, which no nation is bound to prohibit, and which

ARGUMENT.

4th Day.

ARGUMENT

4th Day.

“ ‘ only exposes the persons engaged in it to the penalty of  
 “ ‘ confiscation.’ These, Gentlemen, are authorities which show  
 “ that where two belligerents are carrying on war, the subject  
 “ of a neutral power may supply to either, without any breach of  
 “ international law, and certainly without any breach of the  
 “ Foreign Enlistment Act (and it does not say a word about it),  
 “ all the munitions of war, gunpowder, every description of  
 “ fire-arms, cannon, every kind of weapon, in short, whatever  
 “ can be used in war for the destruction of human beings who  
 “ are contending together in this way. Well, Gentlemen, why  
 “ should ships be an exception? In my opinion, in point of law  
 “ they are not.”

Now, my Lords, I am not going to insist upon that. Of course we know that his Lordship did not mean that to apply to the Foreign Enlistment Act. I do not think that it would be right to suppose that the jury would necessarily have understood that his Lordship, in saying “Why should ships be an exception?” was then referring to the Foreign Enlistment Act. He had mentioned that the Foreign Enlistment Act did not touch other contraband, but we cannot suppose that that, standing alone, would have been misunderstood. The expression clearly referred to the general rule of international law independently of the Foreign Enlistment Act. I cannot help observing, however, that unless it were made clear by subsequent expressions—even the passage I have read had a misleading tendency; because it appeared to make this the starting point for the inquiry—it said, All these things are lawful by international law, there was no reason in the world why ships should not be as lawful as anything else. I say, if the jury did not find anything in the subsequent part of the statement which pointed out the distinction between the case of a merely commercial adventure in contraband—sending guns, or anything else, for sale abroad—even ships of war, which, in the case of the “*Santissima Trinidad*,” Story said was lawful—I say, if no distinction were afterwards drawn between that case and the case of a ship fitted out by a shipbuilder in this country directly for a belligerent, there would be a misleading tendency. It is of course one thing to sell as a commercial transaction, when there is only one party in the matter, and that the merchant, who has trade only in view; but quite another thing, when we have by the aid of others, (and of course these things must be done by the aid of instruments in a neutral country,) a belligerent power concerned in the equipment of a ship; and you must distinguish an adventure of this kind from a commercial adventure where there is only one party,—the merchant, who is simply making the article, and selling it upon speculation.

*Lord Chief Baron.*—What is the doctrine laid down by the Attorney General?

*Mr. Attorney General.*—That I consider that no human being can object to the statement, considered merely as a statement of international law.



*Lord Chief Baron.*—What I ask is, what is the doctrine laid down by the Attorney General upon this part of the case. Of course, I mean the late Attorney General.

*Mr Attorney General.*—The late Attorney General I apprehend entirely agreed, as all persons must agree, with the statement of international law generally, which was made by your Lordship there, with respect to merely mercantile dealings in munitions of war.

*Lord Chief Baron.*—He did not differ you know from anything. I mean can you point out any part of his statement, either in opening or in reply, where there is a single proposition clearly and distinctly laid down upon any matter connected with the subject we have to discuss.

*Mr. Attorney General.*—I think I can; most decidedly my Lord. I think you will find that the view of the subject I have been contending for is, both in opening and reply, stated by the late learned Attorney General.

*Lord Chief Baron.*—Will you point out the passage?

*Mr. Attorney General.*—I will take the last first,—at page 226 the Attorney General says this, “All I ask you to do is this, “you will take the law, so far as it affects your decision, of “course, from my Lord. The facts you will judge of on the “evidence, no doubt availing yourselves of such observations on “these facts as the great experience and knowledge of my Lord “will suggest to him, or enable him to make available to you. “I ask you to give your conclusion in this case on the evidence, “and I will state at once what I intended to have stated a little “earlier, that so far I agree with my learned friend that the “intent must be an intent of one or more having, at the time, “the means and opportunity of forwarding or furthering such “intent by acts. I agree that anything else, called an intent, or “that which would be called an intent in the mind of any person “not of this description, must be treated properly as a mere “wish, imagination, or desire. By ‘intent,’ undoubtedly the Act “means practical intent.”

*Lord Chief Baron.*—That is a statement that by “intent,” the Act means practical intent.

*Mr. Attorney General.*—Yes, my Lord. Then he goes on to say that here you have various persons.

*Lord Chief Baron.*—I must say that I do not think that that answers my question.

*Mr. Attorney General.*—There is a very long argument on the law, as opposed to the law argued upon by Sir Hugh Cairns.

*Lord Chief Baron.*—That is not what I asked for. What I asked for is this:—can you point out, either in the opening or in the reply, any proposition of law clearly and distinctly laid down for the direction of the jury, or for the assistance of the Judge.

*Mr. Attorney General.*—At page 199, which comes after a considerable argument upon the law as opposed to my learned friend, he says, “The next contention of my learned friend was “this, that to bring the case within the statute, the vessel

ARGUMENT.

4th Day.

‘ described in the 7th section must be a fully armed vessel  
“ issuing out of a port. Now I cannot of course agree to  
“ that argument, or adopt that view of the section of the  
“ statute, because it is upon the surface of the statement in  
“ the first sentence which I addressed to the jury, that this was  
“ not an armed vessel.” Then he says, “ I will come hereafter  
“ to the arms that were probably intended to be put on board  
“ her by-and-bye, but at the time of the seizure the vessel was  
“ was in the state that I described, built for warlike purposes,  
“ and for those only, but not having received any armament on  
“ board. Now, addressing myself to this point, I have no  
“ doubt your Lordship has observed that those various words  
“ (and they are numerous), which are used in the statute, such  
“ as ‘equipped,’ ‘furnished,’ ‘fitted out,’ ‘armed,’ and so on,  
“ are used, not conjunctively, but alternatively.” Then he  
again repeats that it is used disjunctively, and then your  
Lordship says, “ My present impression is that they all mean  
“ precisely the same thing.” Well of course it was not for the  
Attorney General to argue with the Bench.

*Lord Chief Baron.*—It might not have been for the Attorney  
General to have argued with the Bench, but if he differed from  
that which I stated, it was his duty to have said so.

*Mr. Attorney General.*—He had just said so.

*Lord Chief Baron.*—This is a point upon a question in discus-  
sion, on which the Attorney General does not lay down a single  
proposition.

*Mr. Attorney General.*—Yes, my Lord.

*Lord Chief Baron.*—No doubt there was considerable difficulty  
The question was, in these Courts, entirely new, there is no  
doubt about that.

*Mr. Attorney General.*—My Lord, I cannot but think that  
your Lordship will find upon a study of the Attorney General’s  
speech —.

*Lord Chief Baron.*—I assure you, Mr. Attorney General, that  
I have taken the greatest pains. At the trial I took the  
greatest pains, and I invited the Attorney General, as it were, to  
allow us together to see what was the meaning of the Act, and I  
could not then discover, and I have not since been able to dis-  
cover a single clear intelligible proposition of law laid down by  
the late Attorney General at that trial.

*Mr. Attorney General.*—I think your Lordship, with great  
deference, does less than justice to the late Attorney General by  
that remark.

*Lord Chief Baron.*—I am now asking you for any instance of  
the kind. You have referred me to two passages, and I think  
without success. If you can refer me to a third, I shall be  
much obliged to you.

*Mr. Attorney General.*—I will endeavour to find something  
more. At present I wish your Lordship to see what remains of  
that passage. The Attorney General had argued that it was in  
the disjunctive sense, and immediately before that your Lord-

ship was good enough to make an observation. "They are used "conjunctively in the preamble and disjunctively in the "enacting clauses." Then the Attorney General says:—"Yes, "my Lord, and I shall show your Lordship good authority that "the true construction, as I understand it, whatever may be "the language of the preamble, is disjunctive. It is used dis- "junctively." If that is not submitting that to be the true construction, I do not know what is. Then your Lordship says, not as asking for any discussion from the Attorney General, who I apprehend would have misunderstood his position towards the Court, if he had replied upon your Lordship, when your Lordship told him what your impression was—then your Lordship interposes an expression of your present opinion, and then the Attorney General goes on:—"My Lord, there are other "material words to which I will call your Lordships' attention. "It is not only a violation of this section that a person shall equip, "or fit out, or arm, or furnish; but if he shall attempt, or "endeavour to do so, or shall procure the thing to be done, or "shall knowingly assist or be concerned in aiding with intent, "therefore any one of those, or the endeavour, or being concerned "in the attempt to do any one of those, as I submit to your Lord- "ship clearly, on the terms of this section, would bring the case "within its operation. That would be a matter for your Lord- "ship's direction to the jury. But if one might, in addressing the "jury, advert to the consequence of such a construction being "adopted, it would be very easy to show that if it were to be "adopted on authority the Foreign Enlistment Act would be a "dead letter, and might as well be thrown into the fire."

*Lord Chief Baron.*—That is merely arguing that it must be construed in a certain way, and that otherwise the object of the Act would not be accomplished. Mr. Attorney General, I think really there is not, either in the opening of the case, or in the reply, any single clear proposition of law with respect to the Foreign Enlistment Act applicable to the case then before the Court. The discussion now and upon this occasion has given rise to a great deal more of research, and of learning, and of distinctiveness, of which your own address to the Court has been a very (if I may be allowed to say it) bright example; but at the time when you are commenting upon the shortcomings of the Judge who tried the cause, permit me to say that I endeavoured to get from the late Attorney General at the time what assistance might be got. I said, What is the clear distinct proposition for which you are contending? I endeavoured to get it but in vain. I looked for it then and I have looked for it since, and I have read the whole of the proceedings over and over again, but all in vain.

*Mr. Attorney General.*—I am to be followed by friends of mine, who will have an opportunity of supplying any passages which they may think fit to refer to upon that subject in addition; but perhaps it would be wiser for me, although my impression is not the same as your Lordship's, to say that I understand the impression of my learned friends upon the other side to be

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

the same as my own ; for it will be found upon the notes of what they said in addressing your Lordship, that they understood me to lay down the same proposition which was laid down at the trial by the late Attorney General—they stated my proposition clearly enough, that any kind of equipment would be sufficient, provided it were done with the forbidden intent ; and I am pretty sure, although I have not got my finger upon it, because I was not quite prepared for any reference by your Lordship to that speech—I am under a strong impression that before the case is at an end something more definite than has been yet produced will be produced to your Lordships upon that point. The exceptions which were stated at the trial certainly show—but, however, that was after the verdict, therefore I will not refer to it. I will not pause upon that, and I am sure your Lordships will do me the justice to suppose that I should be anxious to vindicate myself from any suspicion of having insufficiently explained the meaning of my learned friend, the late Attorney General ; of whom I must say, since he has been referred to, that I do not think it was ever given to any man to act under a more honourable and upright, or more accurate and judicious colleague, than I found it to be my lot, when I acted under him ; and although under other circumstances, to fill the position which I now do, might have been an object of ambition to me or anyone else, yet the circumstances under which I fill it——

*Lord Chief Baron.*—Whatever tribute you are disposed to pay to the late Attorney General, I believe everyone who knew him will join in. I knew him from going on the same circuit, before he became a law officer of the Crown, and, undoubtedly, a more honourable, and, I believe, a more honest man—a person of more thorough integrity, or a more high minded man, never existed at the English bar. Still I must say that I am not at all surprised that you do not immediately answer the question, because I myself, at the time of the trial, almost implored him to lay his mind alongside of mine ; and let us see what was the meaning of the Act, and I got no assistance whatever. I have since endeavoured to obtain that assistance. I have looked over both the opening and the reply, and I can find no distinct proposition of law laid down in the manner in which you have so ably done it both to-day and yesterday. I find nothing of the sort. I am not surprised at it, because the subject was undoubtedly entirely new.

*Mr. Attorney General.*—I was going to say, my Lord, your Lordship will believe that in any observations which it may be my duty to make in reply to your Lordship upon this occasion, that I make them with the full knowledge and consciousness that your Lordship was obliged to deal with a difficult subject without that opportunity which we all now have had of equipping our minds upon it, if I may use your Lordship's own expression ; and if my friend the late Attorney General failed to present to your Lordship's mind that view of the law which certainly we thought had been sufficiently conveyed, and for which he was contending, it may not be wonderful if in some things your

Lordship may have omitted to make observations which you would have made, or may have made observations which your Lordship would not have made, had it been otherwise. But still, my Lords, I am bound to show that the actual tendency of what fell from the Court, if my argument on the law is correct, was to mislead the jury on the subject of the law. As I said, I have no exception whatever to take, when properly understood, to the passage which I have just read, beyond this, that I do not think it was truly relevant to the matter in hand, and that, being introduced as it was it would naturally appear to the jury to be relevant and would be connected in their minds with other and ulterior observations which fell from the Bench.

*Lord Chief Baron.*—What is that you are referring to?

*Mr. Attorney General.*—The proposition in which your Lordship speaks of the general right to carry contraband of war. I think that was not the question; it was a point which did not conduce much to the elucidation of the question. Everything that was stated was quite accurate, and it might, of course, have been made clear in the sequel that it was not meant to be taken as a rule for the determination of the question; but, as the sequel proceeded, I cannot but think that it may have had some influence upon the mind of the jury with regard to the way in which they were to interpret the direction they received as to the law from your Lordship. Then your Lordship proceeds thus,—I am reading from page 230, “Presently I shall have to put to you the question of fact about the ‘Alexandra,’ which you will decide. The Foreign Enlistment Act”—I beg your Lordships’ particular attention to this passage of the summing up: because the jury must have understood that the learned judge did direct them as to the construction of the Act; and I own I think it will be found that there was either an erroneous construction, or an omission to give the direction which the learned judge probably intended to give. He says “The Foreign Enlistment Act it is now necessary for me to advert to in order to tell you what is the construction which I put on the 7th section, which alone we have to do with on the present occasion.” After these words it was quite impossible but that the jury should have understood your Lordship as telling them, what the construction was which your Lordship did put upon the 7th section. Therefore, what followed must have been applied by them as intended to convey to their minds your Lordship’s construction of the 7th section; and if it did not convey that construction they must have been misled by it. That is quite clear. Then your Lordship states the terms of the section, and refers to the title, and to the preamble, and to the 7th section, and then your Lordship reads it. Then at the bottom of page 230 the question which your Lordship proposed to state is mentioned, not exactly in the same terms in which it was afterwards put, but in terms which I cannot but think were less distinct, to say the least, than they should have been, in order to convey a true and correct impression of the real

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

question at issue. "Now, gentlemen, the question that I shall propose to you is this, whether you think that this vessel was merely in the course of building for the purpose of being delivered in pursuance of a contract, which I own I think was perfectly lawful; or whether there was any intention that in the port of Liverpool or any other English port (and there is certainly no evidence of any other), the vessel should be equipped, fitted out, and furnished, or armed for the purpose of aggression." Now I quite agree there that although the copulative "and" is used, in "equipped, fitted out and furnished," you have the disjunctive "or" before "armed." What are the two propositions contended for? and what is the alternative stated there? Whether they think the vessel was merely in a course of building for the purpose of being delivered in pursuance of a contract entered into, if so, perfectly lawful; or, on the other hand, not being built to be delivered in pursuance of the contract, but to be employed in the port of Liverpool for the purpose of aggression.

*Lord Chief Baron.*—That is instead of reading the whole verbiage of the statute.

*Mr. Attorney General.*—No doubt, my Lord. I agree that to read the whole verbiage of the section would not have thrown any light upon the subject, to any one's mind. I think what might have misled the jury is this: there seems to be a distinction made between a thing that has been done in pursuance of a contract, and that which is being done for the purpose of aggression. The jury are not told it may be for the purpose of aggression within the meaning of the statute, whether done without a contract or with a contract.

*Lord Chief Baron.*—Nor was it necessary to tell a special jury that.

*Mr. Attorney General.*—Speaking with the respect I unfeignedly feel—

*Lord Chief Baron.*—I say that it is not usual in this Court, or in other common law courts, to expect a perfect treatise on the law from the Judge presiding at the trial.

*Mr. Attorney General.*—I know it my Lord. That direction which the jury was taught to expect from your Lordship is not to be found except in the passages upon which I am obliged to make these observations, and although it would be far from me to offer any verbal criticism that did not fairly go to the general tendency and substance of the charge, yet when we do find expressions of that sort which require explanation, and not only once but reiterated afterwards, and an absence of that instruction which the jury were taught to expect as to what was the real meaning of the Act, I think we cannot but see that they must have been misled. That is followed by a passage which enlarges on the same point, and, I must say, contains a proposition to which, with great respect, I must demur as exceedingly inaccurate.

*Mr. Baron Channell.*—How would you understand the passage you have just read if the second alternative had come first? I

leave to you the question whether there was any intention in the port of Liverpool, or in any other English port, that the vessel should be equipped, fitted out, furnished, or armed for the purpose of aggression, or whether that not being the intent, she was merely in course of building for the purpose of being delivered in pursuance of a contract. In that case, I think it would be perfectly lawful.

ARGUMENT.

4th Day.

*Mr. Attorney General*.—There could be no possibility of any exception being taken to the correctness of that view. So interpreted, there can be no exception taken to the correctness of the language; but your Lordships will see that the language, as it stands, does not express that it was to be a contract without any purpose of aggression. I have no doubt that might have been the meaning of the learned Judge. But your Lordships will find in a subsequent passage which follows, observations are made on the efficacy of a contract in this country which I must take exception to as being erroneous.

*Mr. Baron Channell*.—I want to go with you as you go along.

*Mr. Attorney General*.—I am prepared to acquiesce in what your Lordship has said, that if the sentence had been inverted and the words added, "contract without any purpose of aggression," one would not take exception in substance to that statement; because the words, "for the purpose of aggression" might have been perfectly consistent with my argument upon the statute. But now, my Lords, what follows is certainly calculated to make that reference to a contract receive a somewhat different sense, in appearance; for his Lordship goes on thus: "That is the question. Now, with respect to the question of building, it is certainly remarkable there is not a word said about it. It is not said that you may not build vessels for the belligerent power. There is nothing suggested of the kind, and clearly by the common law and by the passages I have read to you, surely, if from Birmingham either state may get any quantity of destructive instruments of war, and if from the various parts of the kingdom where gunpowder is made, they can obtain any quantity of that destructive material, why should they not get ships? Why should ships alone be themselves contraband? Now, Gentlemen, I will state to you why I put the question I did to the Attorney General; I said, Do you mean to say that a man cannot make a vessel, intending to sell it to either of the belligerent powers that requires to have it, to that one who will give him the largest price for it? Is that unlawful?" That is the very case of the "*Santissima Trinidad*," the ship "*Independencia*." "The learned Attorney General, I own rather to my surprise, declined giving an answer to a question which I thought very plain and very clear."

Now, if I may take the liberty of saying so, the Attorney General appeared to me to answer in substance this:—If your Lordship's case is one which means that there is no intention to do the thing which the Act prohibits, then I do not say that it is unlawful, but I would rather meet the case when I know the

ARGUMENT.

4th Day.

circumstances: and I take it that the Attorney General meant this: it is not every case in which a man does that which these words describe, which I should be prepared to admit to be lawful; because there may be an act which has such an appearance, but which is really the result of concert with one of the belligerents, which comes from their order, and is done at their instigation; and which, although it has the elements which are there mentioned, may also have other elements which will very much alter their effect. Therefore the learned late Attorney General preferred not to deal with a case which he said was different from that which was then before the Court, reserving the question when such circumstances might arise. Perhaps it may be regretted that he did not say at once what I am prepared to say now, that in the case of the Santissima Trinidad, it was held that such a ship might be taken abroad for sale, provided it were done without any previous concert with any intended purchaser; and I should not argue that this statute would prevent such a thing as that being done here. Then his Lordship says he desired to have his mind instructed by the learned Attorney General. "The learned Attorney General, I own, rather to my surprise, declined giving an answer to a question which I thought very plain and very clear. You saw what passed. I must leave you to judge whether there was anything improper in the manner in which I (so to express it) communed with the Attorney General on the law, so that we might really understand each other, and that I might have my mind instructed, fitted out, equipped, and furnished, if you please, by the contents of his. Gentlemen, the learned Attorney General declined to answer that question. But I think, by this time, having read to you these matters, you are lawyers enough to answer it yourselves;" that is, he had read those passages of international law from Kent and Story and other books. "I think that answer ought to be 'yes, a man may make a vessel;' nay, more, according to the authority I have just read, he may make a vessel and arm it and then offer it for sale." That was a perfectly accurate reference to the authority in the case of the "Independencia," for that ship which was the subject of the sale, and of that commercial adventure, was taken out fully equipped and armed, and even with the crew on board who, by a transfer of their engagements, afterwards remained upon her as a ship of war. So that it was most accurate to say, he might not only make the ship, but that he might make it and arm it, it being not in truth ordered or fitted out with the intent of being employed for warlike operations in the service of any foreign belligerent, because the foreign belligerent was no party to the fitting out or arming before or at the time when it was going on. His intention was not formed then, and could not exist, and the person who could alone have any intention under the circumstances, having merely a mercantile intention, took the commodity to the best market he could find for sale. So far that was right. But now I will ask your Lordships to observe what



follows, which, with the sincere respect I always feel for his Lordship—seems to my mind a proposition which his Lordship would now desire to qualify, and to correct in all probability; but which must have had a very misleading influence on the minds of the jury. His Lordship proceeds thus: “But I meant gentlemen, as I said then, if I had got an affirmative answer to that question, to put another. If a man may make a vessel, may build a vessel for the purpose of offering it to either of the belligerent parties who is minded to have it, may he not execute an order for it?” Now observe, my Lords, that would be the same thing which he might sell, that is the ship, and the ship armed, because he may make and sell the ship ready armed and equipped; and of course the question will relate to the same matter. His Lordship proceeds: “Because it seems to me to follow as a matter of course, if I may make a vessel, and then say to the United States, I have got a capital vessel, it can easily be turned into a ship of war; of course I have not made it a ship of war at present.” That he could not do. He is not the belligerent, he has no power to do that. “Will you buy it? That is perfectly lawful. Well, if that is lawful, surely it is lawful for the United States to say ‘Make us a vessel of such and such description, and when you have made it send it to us.’” I take exception to that. I say that is absolute positive error, and that it might mislead, and probably did mislead the jury in a most material degree. His Lordship had said he was going to tell them his view of the construction of the 7th clause of the statute; but the statute strikes at that, while it does not strike the other transaction, provided always, of course, it was done with the prohibited intent; because the United States coming into this country are masters of the belligerent intention; there is a warlike intention, and if the United States send here and say to a ship-builder “Make us, equip and fit out for us, a vessel of such and such a description,” to say that because he might do it as a commercial speculation, and take it abroad and sell it to them, therefore he may execute for them an order for it here, that is precisely to set aside the distinction which the statute introduces. I will demonstrate that in a moment. I will take that very case of the “Independencia”; if that had been done under an order of the Government of Buenos Ayres at Baltimore which was done without their order, it would have clearly, and beyond possibility of doubt, been struck at by the Act, for that ship was fully armed when she left the United States. And if the vessel had been built, equipped, and armed under such circumstances, no human being, under the words of the American statute or this, could deny that the statute was violated. The principle, if good for anything, goes to the full length, that because you may take abroad to sell, as a commercial adventure, a ship built, equipped, and armed to the teeth, and, with her crew on board, that what you may do in that way, you may also do in this country, execute an order for the same article from the United States as a belligerent, an order from a belligerent for a ship to be fully armed and equipped.

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

Now, my Lords, I say that there is positive error in that passage of the charge of the Lord Chief Baron, an error most material, which must have been connected in the minds of the jury with the statement which his Lordship had previously made when first adverting to the question, saying, "It is necessary for me to advert to the Act of Parliament, in order to tell you what is the construction I put upon the 7th section, which we alone have to do with on the present occasion." How does his Lordship proceed? His Lordship proceeds thus: "Now the learned counsel certainly addressed themselves very much to this view of the matter. 'But if you will allow this, you repeal the 'statute.' Gentlemen, I think nothing of the kind." That is, if you allow the same thing to be done under the order of a belligerent which can be done without his order, you do not repeal the statute. "What that statute meant to provide for was, I own, I think, by no means the protection of the belligerent powers. I don't think their protection entered into the heads of those who framed this statute, otherwise they would have said, You shall not sell gunpowder, you shall not sell guns. There are places that now and then explode in different parts of the kingdom no doubt, and which would have complained very heavily if they had said You shall not sell powder, you shall not sell arms! Why, all Birmingham would have been in arms. But the object of this statute is this,—We will not have our ports in this country subject to possibly hostile movements. You shall not be fitting up at one dock a vessel equipped and ready, not being completely armed, but ready to go to sea; and at another dock close by, be fitting up another vessel, and equipping it in the same way, which might come into hostile communication immediately, possibly before they left the port. It would be very wrong if they did so, but it is a possibility. Now and then it has happened, and that has been the occasion of this statute, no doubt." That last remark is merely an illustration; but, observe, his Lordship uses it in connexion with this remarkable statement, that whatever might be lawfully sold abroad, if taken abroad as a mere commercial adventure, may be lawfully made here under an order from a belligerent; which he follows up by saying; no doubt it was not the intention of the statute to interfere with the contraband trade; and that would, of course, be in the minds of the jury, with the general statement of the law as to contraband trade, with which his Lordship had begun. What follows upon that? If we have got here the instruction which the jury were taught to expect, namely, the construction which his Lordship put upon the section, we have clearly got a wrong one. But then what follows immediately? His Lordship says that he is not going to put to them the question, as to the purpose for which this ship was intended. He says: "Well, if that is so, let us see what is the condition of this vessel. The vessel was clearly nothing more than in course of building. I do not know what conclusion you would come to as to what service she was intended for. If it became a matter of importance to decide

" that, it would be a question for you to decide, whether it  
 " amounted to more than a strong suspicion, or whether it was so  
 " made out to your entire satisfaction so as to justify a verdict  
 " in that direction. But, gentlemen, I do not propose to put that  
 " to you." So that his Lordship did not propose to put to them  
 what we say was the whole question in the case, namely,  
 whether this ship was intended for the belligerent service of the  
 Confederates. And, obviously, the jury must have thought the  
 reason why his Lordship did not propose to put that question to  
 them was, that it was lawful for a ship-builder to execute any  
 order whatever for a belligerent in this country, notwithstanding  
 the statute, if he might have taken abroad for sale, as a specu-  
 lation for himself, the same kind of goods independent of the  
 statute.

ARGUMENT.

4th Day.

*Lord Chief Baron.*—You will find that that is quite incon-  
 sistent with the question that was ultimately put.

*Mr. Attorney General.*—No, my Lord, I think not.

*Lord Chief Baron.*—I believe, utterly.

*Mr. Attorney General.*—I know your Lordship intended it so.

*Lord Chief Baron.*—The practice in this Court, as I have  
 already observed, is not to proceed in the course which you are  
 now pursuing. I do not mean further to object to it. The  
 question is, was, at last, the true question in the cause put to the  
 jury.

*Mr. Attorney General.*—Your Lordship is perfectly well aware  
 that there are many cases which show, that, where the inter-  
 pretation of an Act of Parliament is involved, the jury ought  
 to be properly directed by the learned Judge as to his in-  
 terpretation of that Act of Parliament. If your Lordship had  
 not said, as you did say, that you were going to tell the  
 jury what the construction was which you were going to  
 put upon the 7th section; still I think it might have been  
 expected, that the object of the remarks which preceded the  
 question put to the jury would be to explain that construction.  
 I say that after those remarks, the jury not having received any  
 information from your Lordship as to what was the construction  
 except from the passages which I comment upon, and to which  
 I object, must have understood the general language of the Act  
 of Parliament, in which your Lordship put the question, in the  
 light of that commentary upon it, which the jury supposed your  
 Lordship had been making, and which I must take the liberty of  
 saying we thought you had made, and which I believe every  
 person engaged in the cause also thought had been made. Your  
 Lordship says: "But, gentlemen, I don't propose to put it to you,  
 "nor do I think it worth while." I think there was a positive  
 error in not putting that question to the jury. We had a right  
 to have the question put to the jury as to what service she was  
 intended for, and undoubtedly your Lordship did not intend to  
 put that question. You told the jury that you did not think it  
 necessary to put that question. That would make them under-  
 stand, that, under the general terms of the question, finally put  
 in the words of the statute, your Lordship did not intend to put

ARGUMENT.  
4th Day.

that to them. Then your Lordship goes on to say: "Gentlemen, "I do not propose to put that to you, nor do I think it worth "while to follow the learned Attorney General through the "whitewashing of Clarence Randolph Yonge: because, after all, "what he proved seems to me to have the least possible "connection with, or effect upon the real question in this case, "which I take to be this: Was the vessel built, or was it merely "in course of building."

*Lord Chief Baron.*—There must be some mistake there.

*Mr. Attorney General.*—I think there probably is a mistake.

*Lord Chief Baron.*—I am sure I did not express myself so.

*Mr. Attorney General.*—Then, my Lord, I will not dwell further on that. I am sure it did not express the meaning that your Lordship intended to convey, and, therefore, it is not necessary for me to say anything further upon it. I will not dwell upon that, because, of course, that would be corrected by the form in which the question was finally put. "Now, gentlemen, I present the matter to you in another point of view." Now here is a passage in which your Lordship evidently failed to express what you intended to convey, because we know now accurately what your Lordship did mean; but no one reading the words which I am going to read (and which I am sure is not an inaccurate expression of what fell from your Lordship's lips), would understand them with the important qualification with which we now know they were meant to be understood. They are these:—"Now, gentlemen, I present the matter to you "in another point of view. The offence against which this information is directed, is the equipping, furnishing, fitting-out, "or arming. Gentlemen, I have looked so that I might not go "wrong (as we have the advantage of having it here) at Webster's "American dictionary, a work of the greatest learning, research, "and ability; no one can complain that I refer to that. It appears "there that 'to equip' is 'to furnish with arms,' in the case of "a ship especially it is 'to furnish and complete with arms.' "That is what is meant by 'equipping.' 'Furnish' is given in "every dictionary as the same thing as 'equip.' To 'fit out' is " 'to furnish and supply' as to fit out a privateer; and I own "that my opinion is, that 'equip,' 'furnish,' 'fit out,' or 'arm' "all mean precisely the same thing. I do not mean to say that "it is absolutely necessary (and I think that the learned "Attorney General is right in that); it is not perhaps necessary "that the vessel should be armed at all points." If that language is accurate—

*Lord Chief Baron.*—There it is certainly inaccurate.

*Mr. Attorney General.*—Well, if your Lordship says so, I am not in a position to verify the language of the report.

*Lord Chief Baron.*—The object of that part of the summing up was to point out that a case which the Attorney General observed upon in his reply, and which raised a distinction between "fitting" and "arming" was correctly decided.

*Mr. Attorney General.*—Your Lordship will pardon me.

*Lord Chief Baron.*—Just let me proceed. I had stated my

opinion ; but I did not lay that down as law. I intended to convey to the jury that that was my opinion, but I read to them the language from the dictionary to assist them in making out the meaning of the words for themselves. I expressed my opinion and nothing more, but then I meant distinctly to point out that I adopted the American decision, that there might be a fitting-out without any arming at all, and that so far the two words did not necessarily means the same thing.

*Mr. Attorney General.*—We know from your Lordship most accurately what your Lordship meant to convey.

*Lord Chief Baron.*—And what I said.

*Mr. Attorney General.*—Your Lordship will pardon me for reminding you what was the understanding at the time.

*Lord Chief Baron.*—What I said was that the jury in that case found that the vessel was actually fitted out although not armed.

*Mr. Attorney General.*—Are the words, “though not armed,” there ?

*Lord Chief Baron.*—They are in the report, and they are stated in the course of the case. Every time that a matter is mentioned you cannot repeat all that belongs to it. It was perfectly well known and stated that in that case the vessel was found to be equipped and not armed. It is not necessary to observe further upon that now. “They found so most properly, for she actually sailed away with her captain who afterwards turned her into a privateer and she went away in a great measure fitted. The jury found that she was fitted. The question is whether you think this vessel was fitted. Armed she certainly was not.” And the other was not armed. The jury was aware of that if they were attending to what was going on, because it was part of the statement in that case that the vessel was not armed.

*The Attorney General.*—I beg to acquiesce in your Lordship’s explanation.

*Lord Chief Baron.*—“Armed she certainly was not, but was there an intention that she should be furnished, fitted, or equipped at Liverpool?” The information containing nothing about arming at all, it would have been improper to put anything about the arming of the “Alexandra.” The question which I put was this.—Was there an intention that she should be furnished, fitted, or equipped at Liverpool?

*Mr. Baron Bramwell.*—I do not know whether my Lord will agree to this as the correct view of his summing up, but, it seems to me, that he in effect said, it is not necessary that the vessel should be armed, but she must have an equipment of a warlike character, so that what you have got to consider is whether she was equipped in that sense. That seems to me to be the effect of my Lord’s summing up. Do you think it was other than that ?

*The Attorney General.*—Your Lordship will see what we understood by it if you will look at what fell from myself just towards the close of the observations at the end of the report, after we had handed up a paper putting down the points which we thought had been ruled, and to which we took objection. One

ARGUMENT.

4th Day.

ARGUMENT.  
 4th Day.

was to the effect that a warlike armament was necessary ; and your Lordships will observe I said, " Your Lordship said the " words were the same, that every one of the words required a " warlike armament at Liverpool." That is what we certainly understood his Lordship to say. I cannot but think that the reference to the Dictionary and the statement of his Lordship's opinion was unfortunate, if his Lordship was relying on the recollection of the jury of the case cited from Peters ; in which it appeared in the report that there was not any arming.

*Mr. Baron Bramwell.*—I do not understand my Lord to say, that he did not give the jury to understand that the equipment must be of a warlike character. I understand my Lord to say that he did make that statement. He said, in effect, " If my " private judgment governed this matter I should say that the " words are identical, and that the case could not be within the " Act, unless the ship were armed, but I will not tell you that, " because there seems to be a doubt about it ; still I think it " must be a warlike equipment ; but that is for you to say."

*Mr. Attorney General.*—If that is the view which your Lordships will take of the meaning of the summing up, then if by " warlike equipment " was understood, as I think the jury must have understood, an equipment distinct from anything in the structure of the vessel, and not to be considered as a warlike equipment, unless distinctively of that character, although the purpose and character of the vessel was proved to be warlike, then I except to that an erroneous direction. His Lordship said in effect that he did not propose to put to the jury the question for what service it was intended. Your Lordship will recollect that. That, of course, was as good as telling the jury.

*Lord Chief Baron.*—That is for what purpose it was ultimately intended.

*Mr. Attorney General.*—The word " ultimately " was not used. I do not think that your Lordship could have meant " ultimately," as distinct from immediately, for this reason, that all the evidence tended to show that it was a contract by the agents of the Confederate States at Liverpool for this vessel to be built, and equipped as far as she could be ; there was no evidence to raise any question of anything like a remote or undecided intention in the case. Your Lordship said, in effect, that the question of what service she was intended for, was immaterial ; and it was not proposed to be put. I take the ruling to have been this ? Gentlemen, you may believe that this ship was ordered by the Confederate States of America, as a gun boat for this service, but unless you believe that she was intended to leave the port of Liverpool with an equipment of so distinctively a warlike character, additional to those you find, as would enable her at once to commit hostilities, then she is not within the Act. If that is your Lordship's ruling, we humbly except to it as erroneous in law. And I think, that, although the language, with which his Lordship concluded, is not altogether unequivocal, yet it is properly susceptible of that interpretation ; because his Lordship says this in page 233, after stating the evidence of

Captain Inglefield, in which the report attributes to his Lordship what I do not recollect having heard, and I do not think his Lordship did so say, Captain Inglefield said, "it was probably as fit for a yacht as any vessel that was ever built." Now, I think the word "yacht" there is an error, because I am sure his Lordship did not intend to misrepresent the evidence. I think it should have been a ship of war, a gun-boat, or something of that kind. The evidence is merely this, it might possibly be used as a yacht, not that it was well adapted for that purpose; I think there is some mistake in that. Then, after stating the effect of Captain Inglefield's evidence, his Lordship proceeds thus, "In short, what he makes out is, that she might have been built for a yacht or might have been built as a vessel capable of being converted into a war vessel." His Lordship must be understood to mean what the witness said, not being changed from a yacht into a gunboat, but being made a complete war vessel by going further, and adding something which had been, according to the original design, intended. "But was there any intention that the port of Liverpool should be made the port of departure for the vessel in that condition?"

*Mr. Baron Channell.*—That is preceded by the words "but the question is."

*Mr. Attorney General.*—"That she should be, in the language of the Act of Parliament, either equipped, furnished, fitted out, or armed with the intention of taking part in any contest." If that means immediately taking part in any contest and being in a situation to do so at the time, it corresponds certainly with the interpretation which Mr. Baron Bramwell has suggested, "That there was a knowledge that very likely she would be so applied there can be no doubt as there is when persons send gunpowder." I think I am entitled to say that the evidence was that the Confederate States had ordered her as a gun-boat. It is not a question of greater or less likelihood, because persons do not order ships of war except to use them as ships of war.

*Mr. Baron Bramwell.*—I take it that this portion of the summing up is favourable to you; I think it is very much so. It says in effect, You may almost take it for granted that everything else is made out. You may take it for granted that she was for the Confederate States, and was ultimately to be applied as a ship of war for the use of the Confederate States, but was she fitted out for that purpose? In my opinion that is leaving the question rather favourably to you. He says if you simply find this vessel was to be fitted out as a vessel of war at Liverpool, then I think you had better find your verdict for the Crown.

*Lord Chief Baron.*—I certainly never intended to make any doubt whatever that she was intended for the Confederates.

*Mr. Baron Bramwell.*—It assumes that you had established that.

*Mr. Attorney General.*—That assists my argument exceedingly, because it enables me to take that as a starting point. I think that his Lordship's ruling amounts to this, assuming that this ship was built under the orders of the Confederate belligerent

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

Government, for their service as a gun-boat, yet looking at the evidence of what she is now, if you do not believe that she is to receive further equipments on board which will enable her to take part in a contest as soon as she leaves the port of Liverpool, then she is not within the Act.

*Mr. Baron Bramwell.*—If I may be allowed to say so, my Lord may be wrong in the view he took of the Act of Parliament, but in my opinion nothing can be more favourable than the summing up for you. "That there was a knowledge that " very likely she would be so applied there can be no doubt, " as there is when persons send powder." I have no doubt that the word "send" should be "sell." "I take it for granted " that there are agents on both sides. One openly buying " every munition of war (and they have a right to do it), " and the subjects of this country have a right to sell to them, " and openly carrying them away; the others buying wherever " they can, and probably endeavouring to take the blockade " or to smuggle in some way or other." It is manifest that my Lord assumed that everything was made out in your favour, excepting the one question of whether there was an intention in some part of this country that she should be equipped so as to be in a warlike condition when she left.

*Mr. Baron Channell.*—There is a 2nd paragraph at page 232. I do not understand the Lord Chief Baron's ruling in that way. He is dealing with the question of fact, which he thinks right to leave to the jury. He says, "I do not know what conclusion " you would come to as to what service she was intended for. " If it became a matter of importance to decide that, it would be " a question for you to decide, whether it amounted to more " than a strong suspicion, or whether it was so made out to your " entire satisfaction as to justify a verdict in that direction. " But, gentlemen, I do not propose to put that to you." Do you understand by that that his Lordship meant that the question did not arise, or that the facts were so clearly in favour of the Crown that it was unnecessary to put that question to the jury?

*Mr. Attorney General.*—I should have understood that, in his Lordship's opinion, the question did not arise; because his Lordship uses those words, that if it became a matter of importance to decide that, "It would be a question for you to decide whether " it amounted to more than a strong suspicion, or whether it " was so made out to your entire satisfaction." That does not seem like the language which would be used if his Lordship had meant to say, the evidence appears so clear that you will not entertain a doubt upon the subject.

*Lord Chief Baron.*—I have nothing to do with that.

*Mr. Baron Bramwell.*—Mr. Attorney, let me call your attention to the last sentence but one of my Lord's summing up;— "If you think the object was to equip, furnish, fit out, or arm " that vessel at Liverpool, then that is a sufficient matter. If " you find that, find for the Crown." That assumes that all the other requisites for a verdict for the Crown were established.



*Mr. Attorney General.*—Unless, my Lord, it is to be interpreted as in substance a direction which necessarily leads to an adverse conclusion to the Crown, that his Lordship did not think it was requisite to go into the other points.

*Mr. Baron Channell.*—It seems to me to make a great deal of difference in your argument in what way you are to understand the words, "Gentlemen, I do not propose to put that to you," because if his Lordship, in expressing himself so, meant to lead the jury to suppose that that question did not arise, then they would understand the way in which he leaves the question at last as a leaving that excludes that consideration.

*Mr. Attorney General.*—I own that is the way I viewed it, and view it still, in the interpretation of those words. I think the jury would naturally so understand it, in the final words his Lordship uses, although no one can say that leaving the question in the terms of the Act of Parliament is not right, provided those terms have been properly explained as far as they should have been; yet when you see there was no other explanation preceding, except that which we have seen; and again, the opposition between equipping, furnishing, or fitting out, or arming the vessel at Liverpool; or, on the other hand, "if you think the object really was to build a ship in obedience to an order, and in compliance with a contract, leaving it to those who bought it to make what use they thought fit of it," I think the jury would naturally suppose that the knowledge which the builder and equipper might have of the intention of the Confederate Government was immaterial, if their business was simply to supply an article of trade.

[*Their Lordships consulted.*]

*Mr. Baron Bramwell.*—I should think if your construction of the Act is right, that there was practically a misdirection, because there is no doubt that the practical effect of the direction was that the mere equipping was not sufficient.

*Mr. Attorney General.*—That is rather my own feeling, and we had never wished to raise it in any other form.

*Mr. Baron Bramwell.*—Would not that save you the trouble of minutely criticising words which are most wonderfully well reported, although not with strict verbal accuracy. I for one am satisfied that this word "send" should have been "sell."

*Lord Chief Baron.*—That is not the only inaccuracy.

*Mr. Attorney General.*—Fortunately I had come to the termination of what I was going to say; and there is only one other remark which I will make, and then leave it in your Lordships' hands. I cannot help thinking that the last words of his Lordship's summing up, in which the question is finally stated, might be misunderstood by the jury in this way, they might be led by them to think that they were to look at the builder, whether his object was to equip and arm, or to build in obedience to an order, and in compliance with a contract; because your Lordship will observe that those last words, which are opposed to the others, could apply to the builder only; they could have nothing to do

ARGUMENT.

4th Day.

with the Confederate Government and their agents ; leaving it, as if the only material intention was that of the builder, whether the builder intended something hostile, or meant to execute the order in the way of trade. I think the jury may so have understood the words, and that it would be a natural construction of them, having regard to the other passages in the charge to which I have adverted and which I have laid so much stress upon. I am, however, satisfied with the way in which it is put from the Bench ; and if my argument upon the law is right, that will of course be all that I desire to establish.

Now, my Lords, I shall fortunately have but little to say upon the remaining part of the case. My learned friend, Mr. Mellish, is, I think, wrong in his law, as to its not being competent to the Court to give a new trial in a case of this description on the ground of the verdict being against evidence. My Lords, the authorities may seem to be meagre, but, such as they are, they tend to show that in the cases to which they apply the rule is a somewhat arbitrary one ; that is to say, that the defendant may have a new trial, but the plaintiff cannot, for that is what it amounts to.

*Mr. Baron Bramwell.*—Allow me to put this question : supposing my Lord was right in the question which he put to the jury, and that you are wrong in your explanation of the statute, would you still say that the verdict was against the evidence ?

*Mr. Attorney General.*—Yes, my Lord, and I think so for this reason—

*Mr. Baron Bramwell.*—You think there was good evidence of an intention for warlike equipment.

*Mr. Attorney General.*—I think there was, and I will tell your Lordships in a few words why.

*Mr. Baron Channell.*—Do you go the length of saying that the learned judge should have told the jury that if they believed the evidence they were bound to find for the Crown ?

*Mr. Attorney General.*—No, my Lord, I do not say the learned judge was bound to tell them that ; but what I mean to say is this, that having regard to the manner in which in the charge the question of equipment had been treated, the jury would be naturally led to suppose that another and a different kind of proof of warlike equipment was to be expected than that which was given ; and that the intention so to do must be brought home to the builder. Perhaps, my Lord, it would be as well that I should make the few observations I have to make upon the evidence with respect to that.

*Mr. Baron Bramwell.*—I should very much like to hear them.

*Mr. Attorney General.*—There was a gun-boat in course of construction. My friend, Sir Hugh Cairns, in his commentary upon the evidence, attacked the witness Da Costa for constantly calling this ship “a gun-boat.” He said he knew it as nothing else. It was proved by Hodgson, the packer, that Fawcett, Preston, and Company, themselves, by Mr. Speers, their foreman, gave the orders to carry things to the gun-boat, and that the ship was called the gun-boat by them, and known by that name as

much by them as it was by Da Costa, who received his information from Mr. Miller. There was no doubt, therefore, of that; the ship was a gun-boat in course of construction. If the evidence of Da Costa was to be believed, and there was nothing to discredit him,—Miller expressly admitted that he was building it conjointly with Fawcett, Preston, and Company, under a contract with Messrs. Fraser, Trenholm, and Company, as agents for the Confederate States. We proved a construction of fitments peculiarly adapted for gun-boats, bulwarks, peculiarly adapted for gun-boats, and nothing else, and nothing wanting to make it operate as a gun-boat, except a pivot plate for guns, which might be put in at any time, and as to which, I should have submitted, in the absence of any evidence to the contrary, you must infer that the work, if not interrupted by seizure, would have been completed in the way proper for a gun-boat; for everything was proceeding in that direction. There was something about guns, which I agree was not traced conclusively to this ship; though it would be fit to be considered by the jury. Putting arms aside, and supposing arms not necessary to be put on board, (guns would be arms,) but putting that aside, is it seriously meant that a ship of that description, a gun-boat, being built for a belligerent under his order, and constructed with bulwarks, hammock nettings, hatchways too small for cargoes, and other things peculiarly adapted for ships of war, wanting not to have its nature changed, but merely to have something added which, when finished, will make it a complete gun-boat, has not everything which is necessary to give its equipments a warlike character? and is it not a conclusion of law, that the work which we found in progress would have been completed, if it had not been interrupted and stopped? Are you to say, that the Crown in all cases of this description must wait until the works have been actually done which it is the object to prevent up to the point at which the ship is fit to receive her arms, the consequence of which will be that by craft and ingenuity, and under the cover of mists and fogs, it may well happen, especially if the law officers of the Crown require any time to consider the evidence laid before them, ships of a warlike description may get away? I cannot see anything in the nature of the thing, in the evidence in this case, or in the Act of Parliament, that would make it right for a jury to assume, that the character of this ship's equipment was not warlike, if that is required by the Act: for I think the hammock fittings and the bulwarks were already of that character, and the whole fittings would have been completed at Liverpool if the ship had not been seized by the Government. It seems to me, if more was required of a distinct warlike character for the equipment, than, according to my argument, was necessary, there was evidence here upon which, uncontradicted as it was, the jury ought to have found it.

Let me deal very shortly with the observations which my learned friend Sir Hugh Cairns made upon the effect of the evidence. He said that there were eight persons, all of them to be disbelieved, without any evidence to the contrary, four or five of them he called discharged servants, but it did not appear that

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

they were discharged for any fault of theirs. One indeed, from a question which was put to him, it was inferred, had left for drunkenness; he denied it, and there was no evidence to the contrary. There were others who had left the service, in which they had long been engaged, in order to get an advance of wages; but there was nothing to show any *malus animus*; indeed, they were most reluctant witnesses for the Crown, and we would have given the world to have been on the other side, in order that we might cross-examine them.

My Lords, these discharged servants, as he called them, were most unwilling witnesses. We had to wring the truth out of them like so many drops of blood.

*Lord Chief Baron.*—They did not appear to be so.

*Mr. Attorney General.*—I am not speaking certainly of Da Costa. Da Costa was not an unwilling witness, and I am not speaking of either Yonge or Chapman; but I am speaking of the workmen. My learned friends observed that the counsel for the Crown evidently expected to get different answers to what they did get. That is quite true. It was with difficulty that we got from those workmen the answers that we did get, and they certainly did not in their manner show any disposition whatever to tell anything that would be favourable to the case of the Crown, which they were not obliged to do. I agree that there were some witnesses to whom that observation would not apply. I am applying it only to the workmen, and I say they were workmen who gave their evidence scantily, and disappointed the Crown with respect to some questions which were asked, and what we did get out of them as to the superintendents or agents of the Confederate States was got from persons who showed no disposition to help us, or to give us favourable answers.

*Lord Chief Baron.*—That would raise a very curious question about evidence, whether you are to infer that a man has proved more, because he has said less, and thereby evinced a reluctance to tell the whole truth. It rather abates from your confidence in their integrity, and that by fully as much as you gain in quantity.

*Mr. Attorney General.*—I think I was misunderstood in that. I did not intend to impute to the witnesses that they answered any question untruly, but merely that we had supposed that they would be able, and of course willing, to give us rather more information than we got from them. But I have no right to suppose that they did not answer according to their recollection at the time, or absence of recollection, those questions which they did not answer favourably to the Crown. But as a matter of fact, they did state, and with no appearance of zeal, what was enough for our case, namely, they proved the continual presence and superintendence, at the construction of this ship and of her machinery, of the agents of the Confederate States.

Well, then, my Lords, I say that as far as those witnesses are concerned, there is nothing, whatever to discredit them. Then we come to the question with regard to Mr. Da Costa, and if Mr. Da Costa is to be believed, (and excepting that he seemed not an unwilling witness, I cannot agree that there was anything

whatever to discredit him or his statement,) admissions were made to him by the builder himself, conclusive as to the destination of the ship, and the persons who had ordered her, and under whose orders she was being made, being the orders of the very same people who were constantly about her, constantly superintending her construction and more or less interfering with it. I say there was nothing whatever to detract from the credit of that person. Then it was suggested by way of explaining the superintendence that there was another ship called the "Phantom," and that that ship was also for the Confederate Government. Nobody said that she was for the Confederate Government. By the evidence it appeared that she was a merchant ship. Whether or not she was intended somehow or other to be used for the purposes of the Confederate Government is a mere matter of speculation which I do not think it necessary to enter upon. Tessier was to command her. It was distinctly proved that she was a merchant ship, and that Tessier commanded the "Bahama," which was also a merchant ship, and which carried out the arms of the "Alabama." I could, if it were necessary, easily construct a theory as to what was to be done with the "Phantom" as well as the "Bahama;" but I abstain.

Now, my Lords, with regard to the rest of the evidence there were Yonge and Chapman, two persons as to whom, if their character was in question, public or private, so graphically described on the late occasion here, and on the late trial by my friend Sir Hugh Cairns, I should be placed in great difficulty; because, undoubtedly, it would be very far from my purpose to say one word in justification of those acts which my learned friend has referred to; but it was certainly a most remarkable thing, and still more remarkable to be repeated before your Lordships than it would be before a jury, that my learned friend began by admitting that it was proved beyond all controversy that those persons were the agents of the Confederate States, (the agency was proved by written documents, some of which came from the custody of our opponents,) to prove whose agency only Yonge and Chapman were called: and then really all the exposure of their delinquencies was just as relevant as if on a trial for murder it became necessary to prove the delivery of a parcel or a letter, which was proved beyond the possibility of a doubt, and never disputed; but in cross-examination of the witnesses, who proved some step in the delivery of that parcel or letter, they were asked the whole history of their lives, and they turned out to be ticket-of-leave men, and to have committed a great many crimes. If they were called to prove any great fact in controversy, no doubt a good deal of observation might have been made upon those who relied upon such testimony. But the way Sir Hugh Cairns turned this, is the most remarkable example of his ingenuity that I ever recollect. He said, the Attorney General entirely misunderstood why I said all that; why I expatiated upon the abominable conduct of those miscreants, as he called them to the jury. It was not to discredit anything they said, for I admit all that to be true, but it was to point out what they

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

had not said, because they had not said anything about the "Alexandra." He says, Mr. Chapman goes to Liverpool, and goes to Trenholm and Company, pretends to be a sympathiser, and worms himself into all the secrets of the firm. There is no evidence of that. It is perfectly true that he pretended to be a sympathiser, and that no doubt my learned friend was quite entitled to condemn, but that he got admitted into any of their secrets, or that he had ever an opportunity of knowing anything about the "Alexandra," did not appear from any thing that passed at the trial, and he was not cross-examined.

With regard to Yonge it was still more wonderful. My learned friend said he only entered into the history of Yonge, that miscreant, because he did not tell us anything about the "Alexandra." But where was he from the time of the commencement of the building of the "Alexandra" to the end? Why, my Lords, on board the "Alabama," at sea. If we had proved anything about the "Alexandra" by Yonge and Chapman, I could well understand my friend would have said, "Do not believe what those people say;" but because we did not endeavour to prove by them any material part of the case, and because we only used these people as necessary media for the proof of matters admitted now to be beyond dispute, for that reason the jury were to believe that the issue of this cause depended on the characters of Mr. Chapman and Mr. Clarence Randolph Yonge.

My Lords, so much for that. I put Yonge and Chapman aside. Then we have Da Costa and all these different servants. Da Costa speaks of what was said to him personally on several occasions by Mr. Miller, and of what he saw and heard Mr. Welsman and Captain Tessier say and do. The servants spoke of what passed in the yard of Fawcett, Preston, and Company, and of Miller and Company. Mr. Miller was in Court at hand,—it was admitted that he was in Court, but something passed, whether the Attorney General was right in assuming that he was sitting opposite to him,—he was there, and he was not put into the box to contradict what Da Costa said, nor did Fawcett, Preston, and Company, or any of those persons named on the record, all of them in constant communication at times, neither Fawcett nor any member of that firm, neither Miller nor any member of his firm, neither Fraser, Trenholm, & Co., nor any member of that firm, not one of them got into the box to say a word as to whether what was said by Da Costa and by the workmen was true or untrue. If it was untrue they knew it, and if it was untrue any one of those witnesses were able to contradict it, but they were not able to do so.

*Lord Chief Baron.*—That really is very questionable, as to Miller, at all events.

*Mr. Attorney General.*—If Miller did not tell Da Costa what he stated, he might have got into the box to contradict him.

*Mr. Baron Bramwell.*—The more vile a witness the easier to contradict.

*Mr. Attorney General.*—It is new to me that where there is positive and direct evidence by a person who is not in cross-

examination shown to be unworthy of credit, whatever may be said as to a certain forwardness of manner, and that he appeared to be zealous in his evidence, although I do not believe that he was so to such an extent as to demand the observations which were made upon it, yet still if the man was in Court who could have contradicted him, who knew whether it was true or false, and did not choose to come forward: upon this state of the evidence, to say that a jury could be justified in finding a verdict against the evidence, imputing perjury to all these people, I cannot understand. Now as to its being proposed to call Miller, Miller was not a claimant on the record at all; but as to the possibility of calling every one of the defendants themselves, the point is so clear as matter of law, that I think you will see that it is entirely beyond all dispute.

Now my Lords, take the Foreign Enlistment Act, and remember the dates. That Act was passed in the year 1819.

*Lord Chief Baron.*—Was not Miller named in the information?

*Mr. Attorney General.*—Miller was charged, but he was not a claimant. I am not going into the technical difference between claimant and defendant.

*Lord Chief Baron.*—Miller was in the information.

*Mr. Attorney General.*—Miller was one of these persons charged in the information as having done the acts from which the forfeiture resulted. He did not come forward as claiming the ownership of the vessel.

*Lord Chief Baron.*—Because the vessel did not belong to him. He is in the information, and he was a party to the act.

*Mr. Attorney General.*—He was not a party to the record. The information contains merely a narrative of the causes which resulted in a forfeiture of the vessel, and if those persons, or any of them, or any persons unknown—

*Lord Chief Baron.*—He is charged with the offence contained in the information.

*Mr. Attorney General.*—That is quite true, he is charged in the information as having committed the offence, but he is not brought here as a criminal. It is not a criminal information or proceeding.

*Lord Chief Baron.*—All I meant to say was, it raises the question whether a person against whom the information is directed, can be a witness.

*Mr. Attorney General.*—I do not think, with great deference to your Lordship, that it does raise that question, although the question is one which is of easy solution, because the law, against persons being witnesses or not under the laws relating to the Customs and Inland Revenue, merely applies to defendants.

*Lord Chief Baron.*—There is no distinction in the information between those who come in to claim the vessel, and those who do not.

*Mr. Attorney General.*—The information is against the ship, and the statement of the names is merely narrative. Strictly speaking, "persons unknown" are as much mentioned in the information as those who are named in it. It is merely narrative,

ARGUMENT.

4th Day.

**ARGUMENT.** and no person was a party to the information in any sense or form, excepting the claimants who claim the property.

**4th Day.**

But, my Lords, I do not want to dwell upon that, because, if Miller had been a claimant, the case would have been just the same. At the end of the 7th section of the Act of Parliament are the words under which the question arose, namely, that the seizure may take place under the forms of the laws of customs and excise, or of the laws of trade and navigation. Now, I must remind your Lordship that two branches of law are referred to. It says, "That every such ship and vessel with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel may be prosecuted and condemned in the like manner, and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation."

*Lord Chief Baron.*—This was a proceeding under the customs and excise.

*Mr. Attorney General.*—It was not indeed. This is not a proceeding under any law except the Foreign Enlistment Act. The Foreign Enlistment Act says, "That any such ship may be proceeded against," that is *in rem*, in like manner and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation.

*Lord Chief Baron.*—And the proceeding is according to the mode of the customs?

*Mr. Attorney General.*—Clearly so. I ask your Lordship's attention to this. It does not say that this is to be deemed a proceeding under the laws of customs.

*Lord Chief Baron.*—We discussed that to a certain extent the other day, and all that could be said about it is, that the proceeding is under the excise laws, although the offence is committed under the Foreign Enlistment Act.

*Mr. Attorney General.*—Strictly speaking, if I may take the liberty of saying so, I should almost doubt, whether it was right to say that the proceeding is under the excise laws, because in proceeding under this Act it only says, "in the like manner, and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws, made for the protection of the revenues and customs and excise."

*Lord Chief Baron.*—It is conducted by the same officer, and proceeds exactly in the same way,

*Mr. Attorney General.*—That is perfectly accurate.

*Lord Chief Baron.*—Then the question is whether along with that there do not go all the exceptions, and all the provisions which belong to the excise laws.

*Mr. Attorney General.*—But let me examine that question.

*Lord Chief Baron.*—It is not worth while to do so. Any parties are entitled to say, I will not put myself into the box in a case of this description; I will not condescend to give you my opinion.



*Mr. Attorney General.*—Of course, every one is entitled to say that. ARGUMENT.

*Lord Chief Baron.*—It is one of the elements upon which the jury will decide. 4th Day.

*Mr. Attorney General.*—If he does that, I think every one moving for a new trial upon the ground of the verdict being against the weight of evidence, would be entitled to say that that is one of the elements to be taken into consideration.

*Lord Chief Baron.*—Do you mean to say that therefore a new trial ought to be granted on that ground? I, for one, should hesitate before I should make that a ground for granting a new trial in a case of this sort.

*Mr. Attorney General.*—I merely say that a verdict being against the weight of evidence is a proposition proved by showing what the evidence was, and that it was all one side, although given in the presence of those who were able to have contradicted it on the most material points if they could truly have done so. I say, under this Act, the procedure is to be after the manner of the Laws of Customs and Excise, or under the Laws of Trade and Navigation. The Evidence Act of the 14th and 15th Victoria, chapter 99, says distinctly in the 2nd section that "On the trial of any issue joined, or of any matter, or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such action, suit, or other proceeding may be brought or defended, shall, except as herein-after excepted, be competent and compellable to give evidence, *viva voce*, or by deposition, according to the practice of the court, on behalf of either, or any of the parties to the said suit, action, or other proceeding. III. But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself or shall render any person compellable to answer any question tending to criminate himself or herself." It is quite clear, therefore, that this gives him,—until subsequent legislation takes it away,—gives a defendant or a claimant in a proceeding like the present, the right of giving evidence on his own behalf, although he could not be compelled to criminate himself. Did any subsequent proceeding take that away? I submit, clearly not.

*Lord Chief Baron.*—I think it is hardly worth while to discuss a question which I think is of an exceedingly doubtful character, and of which I do not see the termination.

*Mr. Attorney General.*—I shall bow to your Lordship's opinion if you think it is not worth while to discuss it.

*Lord Chief Baron.*—If the question were to arise before me in the sittings after Term, I should certainly reserve the point for the opinion of the Court. I should receive the evidence as I always do if there is any difficulty about it.

ARGUMENT.

4th Day.

*Mr. Attorney General.*—I should have thought that it was plain that the right to give evidence on his own behalf given by that Act could not be taken away by such words as we find in the two subsequent Acts of Parliament, namely, that the defendant shall not be a witness in substance in any case relating to the customs.\* It might be most injurious to take away that right, and surely that right is not to be taken away from him by an Act which speaks of proceedings under the laws relating to customs, if this is not an Act properly relating to customs. It is, however, enough for me, if the matter is assumed for the present purpose in my favour. At the trial nobody suggested that it would not be competent for any of these persons to offer themselves as witnesses if they pleased.

*Lord Chief Baron.*—So said the Attorney General, but you are quite mistaken if you include the judge in that opinion. I did not say anything. I did not think I was called upon to say whether the Attorney General was right or wrong.

*Mr. Attorney General.*—I do not mean to imply that your Lordship had an opinion, which you did not express at the time one way or the other. What I meant was, that nothing passed to lead to the conclusion, either from what was said by Sir Hugh Cairns or by the late Attorney General, that it was doubted on either side that Mr. Miller might have been put into the box, and also the other parties. There was no suggestion any where of the kind.

*Lord Chief Baron.*—Excepting that not one syllable was said about it until the case was over, and it was only when the Attorney General was replying that the question was raised. Sir Hugh Cairns did not tender witnesses, and he might not have tendered them because he might have thought that they were not evidence. There was no opportunity. The question never arose at all. The point was never discussed. The opinion of no one but the opinion of the Attorney General was ever made public at all.

*Mr. Attorney General.*—The thing took the only course which it possibly could have taken under the circumstances.

*Lord Chief Baron.*—No. Sir Hugh Cairns might have tendered the witness, and the Attorney General might have objected to him.

*Mr. Attorney General.*—Sir Hugh Cairns did not tender the witness, and did not suggest that as a reason for not tendering him. Sir Hugh Cairns suggested other and totally different reasons, reasons which he was perfectly entitled to state, and in which I entirely concur from the bottom of my heart, namely, that it was incumbent on the Crown to make out its case, and no one could call upon the defendants to put themselves or any one else into the box, if the Crown had not laid before the jury sufficient evidence of its own case. Undoubtedly my friend was

\* 18 & 19 Vict. c. 16. s. 36. and 20 & 21 Vict. c. 62. s. 14, and vide note, p. 176 ante.

right in that; but he did not suggest that he entertained any doubt, that, if he had considered it expedient to put them into the box, they might not have given evidence; nor did he so reply, when the Attorney General made the remark which your Lordship has alluded to, and when something passed from the Bench to the effect, that it was unusual for the Attorney General to assume that any particular person was opposite to him in Court. It was said you may assume that the gentlemen are all here, and that they might have been put into the box. Sir Hugh Cairns deliberately chose not to tender them; and I am prepared to prove, to your Lordship's satisfaction, I hope, that no one could have successfully objected to their evidence, if offered; because the Evidence Act had given them the right.

*Lord Chief Baron.*—We cannot decide that now, and I think it hardly worth while to discuss it.

*Mr. Attorney General.*—I will not proceed further with it; but I think, under the circumstances, I am entitled to have it assumed in my favour that those persons who might have been tendered as witnesses, and as to whom it appears to us that they would have been competent witnesses—persons who might have contradicted the evidence given in my favour if it were not true—they did not offer to come forward into the box to give evidence for that purpose.

My Lords, I shall conclude by very shortly referring to the point as to there being no rule for a new trial in such a case as this. It is settled by the case of *Attorney General v. Rogers*, reported in the 11th Meeson and Welsby, and by another case reported in the 1st Crompton, Meeson and Roscoe, that when a jury in a penal action had found a verdict for the defendants, through a misapprehension of the law, if the Court thought that there was any reason to believe that, whether by a mistake of the learned Judge's direction, or through any other cause, they had been so misled, there would be a new trial. My Lords, those are cases applicable to penal actions properly so called; and that rule, as far as I am aware, never yet has been extended to an information *in rem* of this description. The state of authority as to informations *in rem*, where you have not defendants to deal with; but claimants coming in to claim property in possession of the Crown, seems to be this. In the books of Practice (though they are not conclusive authorities, they show what the law has been understood to be), in Manning's Exchequer Practice, at page 180, your Lordships will find the law stated thus:—"A new trial will be granted where the justice of the case requires it, although the verdict be for the defendant." That is stated as applicable to informations *in rem*. I find in a note to Bate-man's Excise Law, I will merely mention the passages without reading them, at page 66, the same thing is stated; while on the other hand the practice applicable to defendants in penal actions is accurately stated at page 161 in the same book. That case in Bunbury, to which my friend Mr. Mellish referred, is a case of an information *in rem*. It is reconcileable with the other

ARGUMENT.

4th Day.

ARGUMENT.

4th Day.

authorities, because it relates to a different subject matter, as to which the other authorities are totally silent. "Whether a new trial can be granted on an information of seizure, when a verdict is for the defendant." The 12th section of the Statute on which that case arose is a section which says, the goods are to be seized by the officers of the customs, and obviously to be dealt with in that way.

Now, my Lords, I have concluded all the observations which I have to offer your Lordships upon this case. I cannot but think that your Lordships will deal, in a way that will be satisfactory to the Crown and the public, with this case. We are not here in an atmosphere where any argument of prejudice, either one way or the other, can prevail. The matter has been fully considered, and I have not the slightest doubt that your Lordships' judgment in this case, in the way in which you will deal with it, will be entitled to and will receive from those who may have to comment upon it hereafter, the same respect which has been justly paid to the long series (for it is a long one) of the decisions of the American Courts on a similar Act of theirs. I must say decisions most honorable to the country, and to the tribunals, from which they have proceeded; because that Act was passed, as your Lordships are aware, under circumstances of peculiar difficulty, when the irritation and the animosity resulting from the war of independence had not passed away, when the recent obligations of the United States to France were fresh in their memory, when the sympathies of the whole country ran breast high with the revolutionary party in France and against the powers of Europe who were then at war with the French Republic. Under those circumstances it was that Washington caused to be introduced that Act; and in every single trial that has ever taken place under it the Judges of the United States have manifested a lofty and most upright determination to give full and fair effect to it, not straining it either in the direction of popular bias or prejudice, or of mercantile interest; and on the other hand, not straining it in favour of the Commonwealth against the subject. We do not wish our own Act to be strained in favour of the Crown against the subject; but we do desire that it shall be established by your Lordships' judgment that those great and most important objects, to promote which that Act was passed, will be found to have been effectually accomplished by that Act, and that the great and most serious mischief which the Act points out as the mischief which it was intended to remedy, may be effectually repressed by the construction which, from your Lordships, that Act shall righteously receive; and that the whole matter may not turn out to have been entirely misunderstood by the Legislature which was engaged upon it, and a futile instrument, incapable of being successfully applied, placed in the hands of the Crown.

Adjourned until to-morrow at 10 o'clock.

## ARGUMENT—*continued.*

---

### FIFTH DAY,—Saturday, 21st November 1863.

---

*Mr. Solicitor General.*—My Lords, after the full and complete, and I might almost say, exhaustive argument of the learned Attorney General, I feel my duty to be a light one, and I shall be enabled to shorten the observations which otherwise it might have been my duty to address to your Lordships. At the same time, this, the first occasion on which the Courts of this country have had to consider the Foreign Enlistment Act, appears to me to be one of so great importance that I am induced to ask your Lordships for your indulgence for a short time while I address to you some observations which appear to me to bear upon the matter.

ARGUMENT.

5th Day.

---

My Lords, I think it may be convenient for me to follow the order in which my learned friend Sir Hugh Cairns and the Attorney General have addressed themselves to this question, and I will accordingly, in the first place, say a few words upon the principles of international law which appear to me to be applicable to it independently of any statute. I will next consider the construction of the Foreign Enlistment Act, and then I will apply myself to the questions of misdirection and the verdict being against the evidence.

My Lords, the scope and tendency of the argument of my learned friend Sir Hugh Cairns appeared to be this; he, in the first place sought to narrow as far as he could the application of the principles of international law which relate to this question. Having so far narrowed that application, he sought to cut down the American Foreign Enlistment Act, in order to square it to those narrowed proportions; and then, thirdly, he endeavoured to show that the English Act had no wider operation than the American Act. I shall contend in the first place that the principles of international law applicable to this question have not been quite accurately stated by my learned friend, but that they have a wider scope than he admitted; next, that the American Act went beyond any international law applicable to the subject; and, thirdly, that our Act went beyond the American Act.

My Lords, my learned friend Sir Hugh Cairns began by stating two propositions of international law which appeared to

ARGUMENT.

5th Day.

him to bear upon this question, and to be the only principles which did bear upon it. The first he stated in this way,—he said the subjects of neutrals are at liberty to supply any articles contraband of war to a belligerent. Secondly, he said the territory of a neutral power is inviolate from any proximate or immediate act of war. I am stating those propositions I think in his own words. Now, my Lords, with respect to the first of those propositions, my learned friend began by conceding that for a neutral Government to supply to a belligerent contraband of war was a violation of neutrality, an unneutral, in other words, a hostile act, but he said the subjects of a neutral are at liberty to do so. If my learned friend meant no more than this, that the subjects of a neutral are allowed to supply contraband of war to a belligerent without involving their Government in hostilities, or without compromising the neutrality of their Government, and further that the neutral Government is not bound by any duty, whether of perfect or imperfect obligation to the co-belligerent, to prevent this traffic, or punish those who carry it on, I agree with him. But my learned friend went beyond that, he proceeded to contend that the supply of those articles of contraband by the neutral subject was in no respect, to use his expression, *contra bonos mores*, that it was not in any respect a *delictum*, that it was not opposed to any principle of international law, but that it was entirely lawful and right. Upon this question I take the liberty of, to some extent at all events, differing from my learned friend. And I will call the attention of your Lordships to the manner in which Mr. Duer, a writer who was referred to in the course of the Attorney General's argument, treats this question, because his argument upon this subject appears to me to be very clear and cogent.

*Lord Chief Baron.*—What volume and page?

*Mr. Solicitor General.*—The first volume, my Lord, page 750. He says, "It has been alleged, that the conduct of a neutral, who engages in a trade that by the law of nations subjects his property to capture and confiscation, is not illegal; that he has a perfect and lawful right to engage in the trade, and the belligerent, a right equally perfect and lawful, to seize and confiscate the property so employed. But the grounds on which this allegation is made are not easy to be discerned. It is, indeed, supported to some extent by the vague language of Vattel; but the observations of this not very accurate or profound writer will be found, when examined, to be inconsistent and self-contradictory. While he affirms that a neutral merchant may lawfully prosecute a trade with the belligerent country in articles contraband of war, he admits that a nation at war, from a regard to its own welfare and safety, has an absolute right to seize and confiscate all supplies of this nature destined to the use of its enemies; and yet he overlooks the inevitable conse-

“ quence, that if these proceedings of the belligerent are necessary  
 “ measures of self-defence, the conduct of the neutral in furnishing  
 “ the war supplies is, in its nature, an act of positive, though in-  
 “ direct hostility ; that it is, therefore, a plain violation of neutral  
 “ duty, and that it is the illegality of the trade, as involving this  
 “ offence, that can alone justify the penalty by which it is sought  
 “ to be restrained. Were the trade lawful, although the bel-  
 “ ligerent might be allowed, from a regard to his own safety, to  
 “ intercept warlike supplies destined to the use of his enemy, he  
 “ would be bound to pay their value and satisfy their freight,  
 “ for thus the injury to himself would be prevented, and the  
 “ rights of the neutral be preserved. In confiscating the goods  
 “ and the freight, and in some cases the ship, the belligerent  
 “ treats the neutral owners as enemies ; and, unless on prin-  
 “ ciple, he has the right to consider them as such, their own  
 “ Government would be bound to listen to their complaints,  
 “ and redress their wrongs.” This appears to me to be cogent,  
 I confess. “ Unless they are rightfully treated as enemies, the  
 “ condemnation of their property, instead of being lawful, would  
 “ be an act of violence and a cause of war. I am not aware that  
 “ the observations of Vattel are sustained by any other writer on  
 “ public law ; and a single remark of Sir William Scott, that  
 “ has already been given, contains in itself a full reply. It is  
 “ found in his observation that there are no conflicting rights  
 “ between nations at peace ; and this observation, although  
 “ applied by him to the single case of a resistance to search, may  
 “ be applied, with equal truth, to every case of a violation of  
 “ neutral duty.” That contains the statement of his argument.

*Mr. Baron Bramwell.*—I confess it seems to me that that is a very elaborate dealing with words, because the proposition may be laid down that it is unlawful in the sense that the party who commits the act is subject to the punishment of capture and confiscation ; it is not unlawful beyond that. You do not treat him as a pirate ; you do not treat him as a prisoner of war. It is perfectly lawful for a man to enlist in the service of a foreign country, and it is perfectly lawful to shoot him. Those are not conflicting rights. What is meant is that there is no other illegality in the enlistment than this, that it subjects the man to be shot. It seems to me, with great submission, that those good folks, if they thought of the use of the words they were dealing with, never could make the mistake they do.

*Mr. Solicitor General.*—There is this distinction between the way in which you deal with a man violating a blockade or a man carrying contraband, and a man who is doing what is perfectly right. For example, take the case of a neutral shipowner carrying enemy's goods, not contraband ; if you take a neutral ship carrying enemy's goods, not contraband, you take the goods out and you pay the owner the freight. You have a right to take out the goods because it is necessary for your own purposes as a belligerent.

ARGUMENT.

5th Day.

ARGUMENT.

5th Day.

*Lord Chief Baron.*—That is to damage the enemy.

*Mr. Solicitor General.*—Yes, but inasmuch as the neutral owner has not done wrong, you do not injure him in any way, you pay him the freight. If he, the neutral owner, commits a wrong against the law of nations, you seize and confiscate his goods.

*Lord Chief Baron.*—You never punish him, you neither imprison him, nor shoot him, nor try him by a court-martial, or in any other Court.

*Mr. Solicitor General.*—That is so.

*Lord Chief Baron.*—It used to be the same with respect to offences against the revenue laws of this country. Originally the revenue laws of this country never punished except by fine and forfeiture.

*Mr. Solicitor General.*—That is so. Upon this question your Lordship accurately stated the law yesterday, if I may be permitted to say so. The law of this country so far recognizes the law of nations, that it will not enforce a contract which is based upon an intended violation of international law; but the law of this country does not recognize the law of nations so far as this that what is an offence against the law of nations, is an offence against our criminal law, and I venture to think that is a sound distinction. I will not follow that subject to any greater length, because it is not necessary to my argument. It was touched upon yesterday, and the matter appears to me to be not unworthy of consideration. I will pass from it in a very few moments, but I will observe that this supposed right, according to international law, of the subject of a neutral state to export contraband to the enemy is the same as his right to break a blockade; there is no way of punishing him unless you catch him in the act; it is not a violation of our criminal law at all events; but still the courts have said, and those cases are referred to by Mr. Duer, that if it appears that a captain of a ship knowing of a blockade intends to violate it, the contract of insurance will not be enforced, because the act of the master of the ship is a breach of international law. That I apprehend to be the principle of our law, and that was the principle upon which the cases referred to by the learned Attorney General yesterday were decided; and I take that as the doctrine that may be considered to be now settled in Westminster Hall. That was the principle on which the case of *De Wutz v. Hendricks* was decided, where a contract founded upon the raising of a loan for subjects in arms against a government in amity with our own was held not to be capable of being enforced in this country. It was not a criminal offence, but an offence against the law of nations, and therefore the courts of this country would not lend themselves to the enforcement of it. I may observe that the language of Lord Stowell in several cases is entirely opposed to the view that a neutral sending contraband or trying to break a blockade is really committing no offence against international law. In the case of the "*Imima*," reported in the 3rd volume of Robinson, page 168, Lord



Stowell says, "The rule respecting contraband is always understood to be that the articles must be taken *in delicto*." That is the term he uses. And then again, in 5th Robinson, in the case of the "Richmond," at page 331, he speaks of a contraband dealing in ships. He says, "Here was an avowed intention of going to sell a ship to a belligerent, which in time of war is at least a very suspicious act, and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for purposes of war, and with a declared expectation that it would be hostily employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act, to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied."

ARGUMENT.

5th Day.

*Lord Chief Baron*.—Provisions are considered now as contraband.

*Mr. Solicitor General*.—In some cases they are; it depends upon the intention and the destination; and coals under some circumstances would be contraband, and under others not. The question of contraband or no contraband is exceedingly difficult when you come to apply it to the facts; but I apprehend that the intention and object is generally the test with respect to articles *incipit usus*, as far as contraband is concerned. I may have a word to say afterwards with reference to that.

*Lord Chief Baron*.—Many of those laws were made by the strong, by those who could enforce them, and therefore the weak were obliged to acquiesce.

*Mr. Solicitor General*.—No doubt.

*Lord Chief Baron*.—And they come into the "*omnibus*," as the Attorney General says; they get into the "*omnibus*" because they are obliged to do so.

*Mr. Solicitor General*.—And the *omnes* are all those who are strong enough to enforce what they call their rights.

*Lord Chief Baron*.—Against those who are compelled by force to acquiesce.

*Mr. Solicitor General*.—Yes, I believe that is so, my Lord. I pass from this subject with the remark that it appears to me not an accurate expression to say that a neutral merchant supplying contraband, whether consisting of ships, or arms and ammunition, is not violating any principle of international law. I apprehend that he does commit an offence against international law, but he does not commit an offence against the criminal law of this country, and I conceive that this country is not bound, under any obligation to other countries, to punish him. In that sense only I accept my learned friend's proposition, and I mean to press this argument no further than this, that this contraband trade in arms and ammunition and in ships of war, which Lord Stowell characterizes as a peculiarly malignant description of trade, is not that description of trade which it appears to me ought to meet with any peculiar tenderness on the part of the

ARGUMENT.

5th Day.

Legislature or Courts of Justice. I do not mean that you must stretch the criminal law for the purpose of including any person not within its words, on the other hand, you are not to narrow and fritter away the Foreign Enlistment Act in order to favour a contraband and illicit trade opposed to the law of nations; and with respect to this Foreign Enlistment Act, if it is contended on the other side that it interferes with one description of trade not peculiarly entitled to be favoured, on the other hand it may be said to be in the interest of peace, and therefore in the interest of the whole community.

Now, my Lords, a few words as to the second principle of international law which my learned friend stated in this manner; the territory of a neutral power is to be kept inviolate from proximate or immediate acts of war. It appears to me that that proposition is too narrow; it should be, that neutral territory should not be the basis of hostile operations. I should prefer stating the proposition in that way, and when my learned friend Sir Hugh Cairns went so far as to contend that a foreign belligerent would have a right to establish here a manufactory of arms—

*Lord Chief Baron.*—You need hardly labour that.

*Mr. Solicitor General.*—I think my learned friend went a little too far in that.

*Lord Chief Baron.*—I think the case which Sir Hugh Cairns would have put would have been setting up a manufacture either by some subjects of the foreign power domiciled here, or by British subjects willing to assist them by commencing the manufacture.

*Mr. Solicitor General.*—I think my learned friend limited his proposition to the foreign belligerents employing their own subjects.

*Lord Chief Baron.*—He would hardly entertain the notion that they could set up in this country a manufactory as a manufactory of the Confederate States.

*Mr. Solicitor General.*—I am certain that my learned friend Sir Hugh Cairns, if he were an adviser of the Crown, would not advise the Crown to submit to such a use of its territory; and when my learned friend endeavoured to limit it to a manufacture in which foreigners were engaged, that would make no difference at all; it would be the use of the neutral territory as a basis of hostile operations, and though no immediate act of war would be committed, it would be such a use of the neutral territory as no neutral state with any respect for itself would permit, and which the opposite belligerent, if strong enough, would be sure to complain of.

Now, my Lords, it appears to me that under this head of the inviolability of neutral territory comes the question of the equipping, the arming and manning of vessels of war by a foreign state in a neutral territory. I apprehend that that is contrary to the principles of international law. This is quite clear, that it gives the neutral a right to complain of the foreign Government on account of any such use of its territory, and I

should be disposed to say that any use of its territory for the equipping of vessels with the intention of using them for hostile operations, though not accompanied with the commissioning or arming or manning, would still be a use of the neutral territory of which the neutral would have a right by the law of nations to complain.

ARGUMENT.

5th Day.

It is another question, which I am not called upon here to discuss, whether there is a right on the part of the other belligerent to require the neutral to assert his neutrality correlative to the right of the neutral to insist upon his neutrality. That may be a very doubtful question. I am not aware that there is any such correlative right; the neutral is the judge as to how far he will protect his own sovereignty and the inviolability of his own territory, and according to American authorities, if he chooses to permit this use of his territory by both belligerents, neither has a right to complain. That is the American doctrine. I will not proceed to discuss how far that doctrine may be treated as established international law, but I think I may venture to suggest a doubt whether it would be entirely satisfactory to us for example, supposing we were at war with the United States, and they were fitting out vessels at Brest and other French harbours, if the French Government were to say, in answer to our exhortations, "You may do the same. I very much question whether we should accept that as a satisfactory answer. But it is not necessary for me to discuss that question.

It appears to me, that on the principles of international law, that mode of proceeding that was suggested by Mr. Baron Bramwell, and which certainly seemed to give some embarrassment to my learned friends on the other side, namely, the equipping of a vessel, all but her armament, on shore, and putting in the armament say three and a half miles out at sea, the armament being shipped with the same design as the equipment, and at the same place, would be a violation of the neutral territory, and clearly an offence against international law; and if that were not plain upon principle, and according to common sense, I think it would be rendered plain by applying the doctrines laid down by Lord Stowell in the case of the "Twee Gebroeders," which has been referred to. And I may observe, when my learned friends speak of this or that proceeding being not opposed to the letter of international law, it is very difficult to say what they mean. It is very difficult to distinguish the letter from the spirit of international law. There are not in international law those technical quibbles and subtleties which we are accustomed to in our law, but which we endeavour as far as possible to get rid of. I do not hesitate to say that if we should have a right to complain of a privateer being fitted out and armed at Brest, we should not consider that we had a less right to complain because her armament was put into her two or three miles out at sea. The case of the "Twee Gebroeders" is reported in 3rd Robinson, page 162. I think the facts are in your Lordships'

ARGUMENT.

5th Day.

recollection. The case was this. A capture was made by a vessel of war lying within the three miles of the neutral territory, but she sent her boats out of the neutral territory, and it was the boats that actually effected the capture. It was there argued that the capture was out of the neutral waters. So it was, in one sense, because the prize was taken out of the neutral waters ; but Lord Stowell would not hear of such an evasion.

*Lord Chief Baron.*—The ship acted like a polypus, sending out its long arm and seizing its prey.

*Mr. Solicitor General.*—Yes, my Lord, and Lord Stowell took occasion in that case to express himself generally upon the question of direct and immediate acts of hostility in a manner which appears to me to be useful to quote. He first says, This may be argued to be an immediate act of hostility, and very much the same thing as the firing of a shot. But he goes on to say, If it were necessary therefore to prove that a direct and immediate act of hostility had been committed, I should be disposed to hold that it was sufficiently made out by the facts of this case." Then he says, " But, direct hostility appears not to be necessary." And it is upon this ground I object to my learned friend's limitation of the rule of international law. " Direct hostility appears not to be necessary, for whatever has an immediate connexion with it is forbidden ; you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility. In the same manner an act of hostility is not to take its commencement on neutral ground. It is not sufficient to say it is not completed there." I cannot help thinking that those words bear very much upon the present question. " You are not to take any measure there that shall lead to immediate violence ; you are not to avail yourself of a station on neutral territory, making as it were a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage." Then he goes on to say, " Many instances have occurred in which such an irregular use of a neutral country has been warmly resented, and some during the present war. The practice which has been tolerated in the Northern States of Europe of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in that neighbourhood, is of that number." Here he assumes the case of a vessel capturing out of neutral waters, itself being in neutral waters at the time of the capture, but sallying from the neutral waters. Then he says, " Yet even this practice, unfriendly and noxious as it is, is less than that complained of in the present instance," and so on.

*Mr. Baron Bramwell.*—As a matter of fact, what is the meaning of that expression, to make stations of their ports ; merely that they made them a refuge, or that they fitted out in them ?

*Mr. Solicitor General.*—I apprehend that the distinction would be just this : if they went merely for the purpose of

ordinary repairs or provisions, or were driven into the place by stress of weather, that would be lawful; but if they, in fact, used the neutral port for the purpose of lying in wait and issuing out of that port in order to prey upon the commerce of the enemy, that would be an improper use of the neutral port, as I understand Lord Stowell, although the capture were not made within the three miles.

*Mr. Baron Bramwell.*—Although they had no warlike stores in the neutral port?

*Mr. Solicitor General.*—Although they had no warlike stores in the neutral port; but they must not make a station of a neutral port. I apprehend that that would apply almost directly to the question put by Mr. Baron Bramwell, that if you equip a vessel three miles out from Liverpool, the vessel would be virtually equipped at Liverpool.

*Mr. Baron Bramwell.*—Lord Stowell says that the practice had been much complained of.

*Mr. Solicitor General.*—Yes, my Lord, and your Lordships will see that he quite agrees that it is a subject of complaint. He says, “Many instances have occurred in which such an irregular use of a neutral country has been warmly resented, and some during the present war”—(that is, by ourselves.) “The practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in the neighbourhood, is of that number, and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act.” So that Lord Stowell appears to think that for a vessel to send out its boats and commit the hostile act is a trifle worse than for the vessel itself to sally out and commit the hostile act.

*Mr. Baron Bramwell.*—He says that that is worse than that of which complaint is made, namely, a vessel not beginning hostilities when within the neutral territory, but making an habitual asylum of the port, as I understand. It is a curious thing, but Lord Stowell hardly goes to the extent of saying that such a thing would be a lawful subject of complaint on the part of the neutral against the belligerent which permitted it.

*Lord Chief Baron.*—They could not in the neutral territory make an arsenal for any purpose. They could not be allowed to use the neutral soil for their own purposes, to advance their own advantage. They would not be allowed by any neutral power to have a place in which to fit out and prepare their own ships.

*Mr. Solicitor General.*—No, certainly not to prepare them.

*Lord Chief Baron.*—So as to fit them for warlike operations, using the neutral port as a place at which to remain and watch, and from which to start on an expedition of aggression.

*Mr. Solicitor General.*—That will be the rule, I apprehend. Therefore, my Lords, I have thought it right somewhat to qualify, and, in fact to extend, the propositions of international

ARGUMENT.

5th Day.

ARGUMENT.  
 5th Day.

law which my learned friend Sir Hugh Cairns appeared to me to state too narrowly, for the obvious purpose of narrowing the construction of this Act, which he endeavours to square with them.

And, my Lords, before I come to the actual construction of the Act, I may be allowed to observe, that though no doubt vessels of war are contraband in the same sense as arms and ammunition are contraband, yet considerations apply to vessels which do not apply to arms and ammunition, and to which it is as well for a moment to advert. A vessel is not merely an engine of war, but a vessel carries engines of war, A vessel carries men to work those engines. A vessel has a nationality; a vessel is territory for some purposes, and inhabited territory. So that a vessel armed, equipped, and manned, is, in fact, floating hostile territory, and a vessel not equipped or manned still has capacities for the combination of armaments, to use an expression of Canning, which take it out of the category of arms and ammunition; and therefore there appears to be some reason why the Legislature should have thought it desirable by enactments to deal with vessels without dealing with other articles of contraband of war. I think that one can easily see very excellent grounds on which that distinction should be drawn; and, my Lords, these grounds are illustrated by the correspondence between Mr. Jefferson and our representative in America, Mr. Hammond, in 1793. I am not going at length into the history of our conduct or the conduct of the American Government. That has been sufficiently brought before your Lordships. I am only going to make one or two short remarks upon that. The distinction between ships and merely arms and ammunition is taken both by our Government and by the American Government in 1793, before any Foreign Enlistment Act existed in either country. It appears that in 1793 we addressed two memorials to the American Government. In the one we complained that they furnished the French, with whom we were at war, with arms and ammunition. In the next memorial we complained that they allowed the French to fit out privateers in their harbours; and to those two separate remonstrances Mr. Jefferson, who was then Secretary of State, addressed himself separately. With respect to the first, he says, "The purchase of arms and military accoutrements by an agent of the French Government in this country, with an intent to export them to France, is the subject of another of the memorials. Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress those callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle, and impossible in practice." I cannot help thinking that this is the strongest argument of all to be urged why a nation should not interfere with the sale of arms, that it would be impossible to inquire how many guns and pistols each manufacturer in the country has been making. *Lex neminem cogit*

*ad impossibilia* is a maxim peculiarly applicable to the law of nations. No country would be so unreasonable as to expect another country to do that which is impossible; but that argument does not apply to ships of war it is possible at all events to deal with them. He says, "It would be hard in principle and impossible in practice. The law of nations therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on their way to the post of their enemies. To this penalty our citizens are warned that they will be abandoned." And I may observe in passing that the American proclamations of neutrality and our proclamations of neutrality always regard the exporting of arms and ammunition as an offence; they call it an offence, but an offence punishable by the law of nations. We tell them in our proclamation that those who infringe the Foreign Enlistment Act will be liable to penalties not only according to the law of nations, but under the Act. Your Lordships will see, if you refer to page 13 of the Appendix, that that is the form of it; I merely refer to it in passing. After various warnings to our subjects not to infringe the Foreign Enlistment Act, it goes on to say, "or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties, or by carrying officers, soldiers, despatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations, for the use or service of either of the said contending parties, all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute or by the law of nations in that behalf imposed or denounced." *Reddendo singulo singulis*; by the statute in respect to all infringements of its provisions, by the law of nations in respect to the exportation of contraband.

Having read the answer of Mr. Jefferson to our first memorial complaining of the supply of contraband, I now come to the next answer with respect to our memorial on the subject of allowing ships to be fitted out for the French. Your Lordships will observe that in his former answer he refers only to arms and ammunition, not to ships at all. He says, "But the practice of commissioning, equipping, and manning vessels in our ports to cruise on any of the belligerent parties is entirely disapproved, and the Government will take effective measures to prevent it." [Then again (this is the only further extract from these American papers to which I will refer), Mr. Jefferson writes this to Monsieur Genèt, the Minister Plenipotentiary of the French Republic:—"The President, after mature consideration and deliberation, was of opinion that the arming and equipping," (he does not here use the term "manning,") "vessels in the ports of the United States to cruise against nations with whom they were at peace,

ARGUMENT.

5th Day.

ARGUMENT.

5th Day.

“ was incompatible with the territorial sovereignty of the United States; that it made them instrumental to the annoyance of those nations, and thereby tended to compromise their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a public reparation to the sovereignty of the country, that the armed vessels of this description should depart from the ports of the United States.” And, my Lords, before any Foreign Enlistment Act was enacted in America, Washington acted upon that policy, at the risk of a war with France, and at the risk of his own impeachment; for a storm of popular indignation was raised against him; the feeling of the country being violent in favour of France, and equally violent against England. Washington, undeterred by all those considerations, did stop the equipment of French privateers, and he put a man on his trial under the common law for being concerned in so doing. I must say that that appears to me to be a very bright passage in American history. I know no stronger instance of the “*Vir justus et propositi tenax*” determined to do what is right, undaunted by popular clamour. Washington by so doing risked his popularity, which he lost for a time, but he persisted in his policy, and finding that the provisions of the common law were not sufficient, he applied to Congress, and his influence was such that he obtained an Act of Congress, going beyond the provisions of international or the common law. I will not refer again to the address to Congress of Washington, which the Attorney General read; but that clearly shows that he considered the powers of the common law, or the rights which international law gave him, were not sufficient, and therefore he came to Congress for the purpose of giving him further powers. The object of the American statute, as of ours, was the preservation of peace. The object was the prevention of disputes. As we all know, in international law there are not those hard lines, there are not those sharp landmarks, which are found in municipal law. There always is a wide margin for dispute if a State is determined to be disputatious and is strong. What Washington wished was to be within this Oregon, this disputed field of international law. He did not wish to discuss with foreign nations precisely how far he might or might not, without a violation of neutrality, allow foreign belligerent vessels to use his ports; he desired to avoid those discussions, and therefore it was that the American Enlistment Act (like the English Enlistment Act, which goes beyond the American Act) was expressly framed for the purpose of exceeding and going beyond the limits of international law. I venture to contend, in the first place, that my learned friend Sir Hugh Cairns has laid down the principles of international law too narrowly; and, secondly, that he has no ground whatever for contending that the municipal statute was passed as merely declaratory or confirmatory of international law; history is there against him.

Now I come to the construction of the statute. My learned friend the Attorney General has already called your Lordships’



attention to this, that our statute is wider than the American statute. I may remind your Lordships that the American statute contains the words "fit out and arm;" we put the words in the disjunctive, and we add "equip and furnish," I suppose with some meaning. It appears to me that you cannot suppose that those words "equip and furnish" were not added with an intention that they should apply to some offence which was not necessarily hit by the words "fit out and arm." I apprehend that "fit out" is one of the widest expressions which you could apply to a vessel; "equip" may possibly not be so wide,— "furnish" may not be so wide,—and those words are added in our Act. And then, as your Lordships are aware, there are added in our Act the words "in order that" in addition to "with intent,"—and for a purpose, which I will venture presently to suggest. And then there comes the clause prohibiting, not only the vessel being equipped for the purpose of cruising and committing hostilities, but her being "used as a transport or "store ship," which words were introduced (if one may refer to history), at the suggestion of Sir James Mackintosh, who said, "The statute without these words will be unfair, because the Spaniards only want transports and store ships; you will allow them to have transports and store ships, while their revolting colonies are not allowed to have privateers." Then that amendment was made in committee, and it was made somewhat awkwardly.

My learned friend the Attorney General has descanted upon this Act so fully, that many remarks which I might otherwise have made are not necessary, and I will endeavour as far as possible to avoid repetition. He has already referred your Lordships to the object of the preamble, and to the statement that the law at present in existence was not sufficient; and he has referred to five clauses, which manifestly carry the municipal law beyond the international law. With those remarks I come to section 7. And, my Lords, upon that section two questions arise, as it appears to me, which I will treat separately. The first in order which I shall take is the intent, and then, secondly, what is to be done in pursuance of that intent. Now, first, with respect to the intent, who may form the intent? No doubt the intent must be formed by somebody who has some control over the vessel. I apprehend, as I think was suggested by Mr. Baron Pigott, that there may be two descriptions of intent, both within the meaning of this statute. The first description would be the intent of a foreign belligerent, or his agent, to employ a vessel to cruise and commit hostilities. The second intent would be that of a person who equipped her in order that she might be so employed. And I cannot help thinking that the words "in order that" were introduced to meet that second intent, for it might be said, by way of what I should venture to call a quibble, The equipper cannot intend that she shall be so employed, because he has no control over her after she leaves his hands. I dare say, as a matter of history, an argument of that sort was put forward, and then the Legislature said, for the purpose of

ARGUMENT.

5th Day.

ARGUMENT.  
 5th Day.

meeting that, we will put in the words "in order that." That, I think, is the probable explanation of the words "in order that" being inserted. Now, with respect to the first class of intention to which I was referring, namely, the intention of a belligerent or his agent to employ the vessel hostilely, if he "procures" her to be equipped, even although the equipper does not know of the intention, I apprehend there can be no question at all that that would forfeit the vessel; it would not be necessary to contend that in this case, but I apprehend it would be so according to the strict construction of the Act. The object is prevention; the object is the prevention, if possible, of any vessel issuing out of this country as the basis of hostilities, and I apprehend that that would be the true construction, and that the vessel would be forfeited independently of any intention at all of the equipper, the intention being in the person ordering the vessel and having control over its ultimate destination to employ her in hostile operations; and if that be so, for a moment adverting to the evidence, there can be, I think, no question that this vessel would have been forfeited upon that ground here. However, that is rather anticipating. Then, secondly, with respect to the equipper, I apprehend that if the equipper equips the vessel knowing that she is to be so employed, then he is within the Act; he equips "with the intent," or "in order that," or at all events he "knowingly aids and assists," and he clearly would come within the Act. And I may refer here to the case which was quoted yesterday by the Attorney General, the case of a druggist who sold drugs to a brewer, he knowing that the brewer would use them in his trade. He there had no control over the ultimate use of the drugs any more than the equipper has over the ultimate destination of the vessel; but Lord Ellenborough put it as high as this, that he was even aiding and procuring (that was, I think, Lord Ellenborough's expression) the brewer to commit an unlawful act by furnishing the drugs, and therefore the contract of sale was held to be void.

*Mr. Baron Channell.*—That was not an action for penalties, and therefore that expression of opinion on the part of Lord Ellenborough was quite unnecessary to the decision of the case; it was only an action for the recovery of the price of a certain article. The particular construction which the Chief Justice put in that case upon the words of the statute are not very important.

*Mr. Solicitor General.*—It may be that he put rather a strong construction upon the words. He uses the words "aiding and procuring." I am not prepared to say that that is not a strong construction.

*Mr. Baron Channell.*—The statute was passed in order to prevent the public being injured by the use of noxious drugs in the preparation of beer. In the same way an Excise Act was passed to prevent the public being defrauded in the delivery of bricks. An act done in violation of such statutes will not entitle the party to recover.

*Mr. Solicitor General.*—Yes, it is not necessary to put the case higher than that; but I think under those circumstances the druggist selling the drugs, though he had no control over the ultimate destination of them, still supplied them “in order that” they might be improperly used; I do not wish to put it higher. And I may put the case of a man who let lodgings to a woman for the purpose of carrying on the trade of a prostitute, who, it was held, could not recover the rent; he had no control over her, but he let the lodgings “in order that” she might carry on an improper trade; and so here, though the equipper has no control over the vessel after she leaves the port, he supplies the ship “in order that” she may be used in the manner prohibited.

*Mr. Baron Channell.*—For the purpose of considering the statute, we have to bear in mind that two classes of persons are to be embraced, the chief actors and the subordinate actors. With regard to the chief actors, it may be that there must be an intent that when built the vessel should be engaged in the service of a foreign power; but with regard to the subordinate actors there must be a guilty knowledge.

*Mr. Baron Pigott.*—Which would be evidence for the jury as to intent.

*Mr. Solicitor General.*—Yes, my Lord; with respect to the intent, I do not think there will be any difficulty in this case. When I come to the evidence I think I shall make that quite clear. It is very seldom in fact that you can prove intent so conclusively as was done here. Now I come to this; what is to be done in pursuance of that intent. The words are these, and we seek to add nothing to the words, and, on the other hand, we desire nothing to be subtracted. “If any person shall equip, furnish, fit out, or arm any ship or vessel” (I will take those words alone at first without embarrassing myself with the question of “attempt”) “with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state,” &c., “with intent to cruise or to commit hostilities.” The word “intent” is unnecessarily repeated, I apprehend. What is the meaning of those words? I could quite understand this proposition; it would be a very definite and intelligible one; she must be equipped so far as to be in a condition when she leaves the port to commit hostilities. That I could understand, but that would mean that she must be armed, because she could not be in a condition to commit hostilities without being armed; and more, it must mean that she must be manned, because the guns cannot fire themselves. So therefore, in order to contend that she must be in a condition to commit hostilities, you must go the length of saying that she must be both manned and armed. But that is against the words of the statute; that is reading the conjunctive instead of the disjunctive, and the very object of the Legislature is defeated, as it appears to me, who intentionally avoided the conjunctive and used the disjunctive. Then again that is distinctly opposed to

ARGUMENT.

5th Day.

ARGUMENT.  
 5th Day.

the doctrine of the United States, laid down in the case of the United States *v. Quincy*, *valeat quantum*. I am not going to discuss now how far that would be considered by the Court, I will not say an authority, because no American case can be treated absolutely as an authority in this Court, but as one in the reasonableness of the decision of which they would be disposed to concur. But I may remind your Lordships upon that point that the case of the United States *v. Quincy* is strictly in point; it is reported in the Appendix at page 78, "To attempt to do an act does not either in law or common parlance imply a completion of the act or any definite progress towards it." No doubt Quincy was indicted for the attempt,—and while upon that subject I may say that I concede that the attempt must be to do that which if done will be an offence. No doubt when there is the intent that the thing shall be done, any step towards doing it is an offence. "To attempt to do an act does not either in law or common parlance imply a completion of the Act or any definite progress towards it. Any effort or endeavour to effect it will satisfy the terms of the law. This varied phraseology in the law was probably employed with a view to embrace all persons of every description who might be engaged directly or indirectly in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the Courts in affixing the punishment, namely, a fine of not more than 10,000 dollars and imprisonment not more than three years. We are accordingly of opinion that it is not necessary that the jury should believe or find that the 'Bolivar,' when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment." Then, my Lords, if that is so, that the vessel need not be in a condition to cruise and commit hostilities, which some of my learned friends have contended for, and which would require the interpolation of words into the statute which are not there, how must she be equipped? That is the question. Now it is contended that the equipment, though not amounting to an actual arming, so that the vessel may be in a condition to commit hostilities, still must be an equipment, as I understand my learned friends, of a warlike character, not *incipit* *usus*, but of a warlike character. Now, as I before observed, I can quite understand what you mean by "arm," but there is a good deal of difficulty in understanding precisely what you mean by "equipment of a warlike character."

*Mr. Baron Bramwell.*—Allow me to ask you, which seems to be a question of considerable consequence, is this case of Quincy a case in point. You see that what the Judge, Mr. Justice Thompson, there says, is this: "That it is not necessary that the jury should believe or find that the 'Bolivar,' when she left Balti-

"more and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed or in a condition to commit hostilities in order to find the defendant guilty," but then they had previously determined that the accessory or subsidiary offender, if we may so call him, might be guilty where he had done less than it was necessary that the principal offender should be guilty of doing; they do not therefore, determine that if the principal offender, the actual equipper, the man charged with equipping and furnishing, had been indicted, it would not have been necessary that the "Bolivar" should have been armed.

*Mr. Solicitor General.*—No.

*Mr. Baron Bramwell.*—If that is so, is it a case in point upon this particular information?

*Mr. Solicitor General.*—My answer to that is, that it is in point, because it is decided upon those words in the American Act, which are the same as ours, and in the disjunctive. The words in the American Act upon which this case was decided are, "attempt to furnish, fit out, or arm;" our words are, "furnish, fit out, or arm." Therefore, I say it is an authority, *non constat*, that if the principal had been tried in the American Courts they would have held that it was enough. Why? Because the words differ; it would have been "fit out and arm."

*Mr. Baron Channell.*—They decided it as a matter of pleading, a very unimportant point connected with the rest of the decision; so far as this point goes they decided that the indictment in point of form was good; that whereas the indictment was levelled against the subordinate actor, as against him it used the very words of the statute and that that was sufficient.

*Lord Chief Baron.*—But for the purpose of constituting the offence two acts are necessary; if any one assists in doing the one, knowing that the other will be done also, or even possibly without that, if anyone assists in the one, he will be indictable for assisting in that one. The American authority seems to be an authority only for this, that wherever the offence consists of two parts, and the assisting of the offender is itself an offence; if you assist in the one you assist in the other; you assist him as to the entire completion of the offence, because he cannot do the whole unless he does that; it is not necessary that you should assist him in both.

*Mr. Baron Pigott.*—That supposes that fitting out simply is an offence.

*Mr. Solicitor General.*—Distinct from arming. But the material part of the case is this, that they distinguish between "fit out" and "arm." If "fit out" and "arm" mean the same thing, there would have been no opening for the distinction, but they say that Quincy may have been guilty of fitting out, although there was no arming.

*Mr. Baron Bramwell.*—Although he did not arm.

*Mr. Solicitor General.*—Yes, although he did not arm, and

ARGUMENT.

5th Day.

ARGUMENT.  
5th Day.

although he did not assist to arm. They say that fitting out and arming are two different things, and that fitting out means something else than arming, and it is impossible to say that that must not have been here decided. They deal with the facts, and they say it is not necessary that the vessel should be in a condition to commit hostilities.

*Mr. Baron Channell.*—You are meeting the argument of the other side, that the equipment, however far it had proceeded, must have been a warlike preparation.

*Mr. Solicitor General.*—Yes; I went back for a moment to Quincy's case in consequence of Mr. Baron Bramwell referring to it. I use the case of Quincy, as going distinctly to this, that the vessel need not be so far equipped as to be fit to be employed in hostile operations.

*Mr. Baron Bramwell.*—I think Quincy's case is of great importance, not so much on account of its own value as on account of the inordinate value that has been put upon it elsewhere, which is, I think, utterly disproportioned to its true value.

*Mr. Solicitor General.*—It may be; it is not for me to say how far the Court will be bound by that case. I should be sorry to rest my argument upon that case; I have good ground without it. I merely use the case as an illustration of my argument; but I think the case cannot be put lower than this; it holds that "fit out" and "arm" do not mean the same thing; that "fit out" means something less than "arm."

*Mr. Baron Bramwell.*—I think it would inevitably be so. I have felt considerable difficulty in this case from a want of knowledge almost of what a ship of war is; but I conceive that a vessel might be fitted out so as to be in a condition to commit hostilities without being properly armed. Suppose, for instance, she had a large crew on board, and she had a large quantity of muskets and cutlasses.

*Mr. Solicitor General.*—Yes; or she might be fitted out to cruise for a voyage of observation against the enemy. The words are, "cruise or commit hostilities." She might be fitted out to cruise without any arms, perhaps, against the enemy; she might carry a large crew supplied with rifles, and so might be extremely effective against an enemy, and especially against an uncivilized enemy, although there were no guns on board her.

*Mr. Baron Bramwell.*—In Quincy's case it was laid down "that if the jury believe that when the 'Bolivar' was fitted out and equipped at Baltimore the owner and equipper intended to go to the West Indies in search of funds with which to arm and equip the said vessel, and had no present intention of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies to endeavour to raise funds to prepare her for a cruise, then the defendant is not guilty." Then apply that reasoning to this case. If the jury believe that when the "Alexandra" was fitted and equipped at Liverpool the builder and equipper intended to take her to

the Azores, and deliver her to the Confederate Government, in order that they might arm and equip the vessel, but the builder and equipper had no present intention of using or employing the vessel as a privateer, but intended her when equipped to go to the Azores, to endeavour to hand her over to the Confederate Government, then the defendant is not guilty.

ARGUMENT.  
5th Day.

*Mr. Solicitor General.*—Your Lordship sees that in that case the equipper was the person who had the control over her, and was to use her as a privateer,—she was not ordered by any foreign Government,—he was the person to use her.

It may be as well for me to say a word or two more upon the question of intention. The Court appears there to have considered that inasmuch as the equipper, having the sole control over her, had not made up his mind at Baltimore whether he would use her as a privateer or not, his mind being in this state, "If I can get funds on my arrival at St. Thomas, I will use her as a privateer; if not, I will go on a commercial voyage," they say there was an absence of the *mens rea* at Baltimore when the vessel started, and that it was not a present intention,—perhaps the more accurate language might be, that it was not a fixed and absolute intention to employ her as a privateer, but a speculation that she might be so employed. "I may or I may not employ the vessel on a hostile cruise," was what Quincy thought; that I apprehend is the explanation of that case; but if the vessel had been ordered by the agent of a foreign Government with a clear and fixed intention to use her as a cruiser, that would have made all the difference.

*Lord Chief Baron.*—Do you not see what a loop hole that leaves?

*Mr. Solicitor General.*—It does. I agree to that, and I am not quite sure that we who are not bound by those cases should quite assent to the doctrine they lay down. We must all recollect that these are the decisions of a neutral—a nation whose normal state has been neutral. I am not quite sure that we, whose normal state has been belligerent, should quite agree to those decisions.

*Lord Chief Baron.*—Our normal state is not belligerent.

*Mr. Solicitor General.*—It has been, I hope it will not be; we have been concerned in most of the great continental wars.

*Lord Chief Baron.*—Great Britain has been at peace during half of my lifetime.

*Mr. Solicitor General.*—I am speaking of before that. In most of the great naval wars we have had something to do. I do not say all. The Americans as a rule have been neutral, they have considered themselves as a neutral nation, whose policy it has been to preserve their neutrality and avoid war as far as possible. Their distance from Europe has enabled them to do that; we, on the contrary, have been drawn into European wars, and most of our international law has rather been laid down from the belligerent point of view. All our prize law, all the decisions of Lord Stowell, are the decisions of a belligerent, and

ARGUMENT.  
—  
5th Day.  
—

the greater part of the international law we have contributed to make has been contributed by us as belligerents.

*Lord Chief Baron.*—Some of our decisions very likely have what painters call a "glazing" of a belligerent character.

*Mr. Attorney General.*—Yes, and the others may have a glazing of neutrality. I am far from saying that we should be bound or inclined, supposing we were belligerents, to allow the Foreign Enlistment Act to be frittered away by another country, as was allowed in the case of Quincy, and in the case of the "Santissima Trinidad."

*Mr. Baron Bramwell.*—Was Quincy convicted?

*Mr. Solicitor General.*—He was acquitted on the facts, (Guinnett was convicted,) the jury, no doubt, believing that he had no present intention.

This brings me back for a moment to the question of intention. I am not going to add to the observations I have made upon that point, except this, that the intention must be a fixed and decided one; that is according to the American authorities; it must not be what is called a contingent intention, which is, strictly speaking, no intention at all. That explains Quincy's case, and it also explains the case of the "Santissima Trinidad." The case of the "Santissima Trinidad," which has been quoted very much out of doors as a case permitting any ship of war to be equipped under a contract with a belligerent, is a case, which it appears to me, has led to very great misapprehension, and it may be convenient for me here to say a word or two with respect to that case. That case is in 7th Wheaton, and the judgment of Mr. Justice Story is at page 334, and it is also printed in the Appendix to the report of the trial. The facts of that case are stated very shortly. I am now referring to it to illustrate what I have to say upon the subject of intention. There a vessel sailed from Baltimore undoubtedly equipped, and armed and manned, and she was sent by the owner to Buenos Ayres, with instructions to the captain to sell her if he could get a good price for her, and I suppose not to sell her if he did not. She was sold to the Government of Buenos Ayres, who commissioned her as a privateer. She subsequently returned into the American port, where she augmented her force, not by the way by adding any guns, but merely by taking in spars and stores and enlisting some men; and the judgment of the Court, as your Lordships are aware, was adverse to the vessel on the ground of the augmentation of her force; that is to say, the prize she had made was restored; therefore what is said by Mr. Justice Story upon the subject of her first equipment was not necessary to the decision of the case.

*Lord Chief Baron.*—It was not necessary to the decision, but that makes no difference, because you may refer to it merely on the personal authority of the writer; and then there is no distinction between what is *ad rem* for the purpose of the judgment, and what is not. Where you refer to an authority in our own law, it is not unusual, and no doubt it is a very proper remark to make where it is applicable. "This is merely *obiter*



"dictum : it was not necessary for the judgment that the Judge " should say that," and it may be taken as accurately describing what passes in the mind of the Judge when he is giving judgment. It must be presumed that as to those matters which are absolutely necessary to the judgment, and upon which the decision is founded, the Judge takes great care, the highest possible care ; but as to other remarks that are made, not for the purpose of the decision, but as illustration, it may be presumed that he draws from the resources of his own mind, but without the same extreme accuracy of attention which he would give to those matters which are the very foundation of the judgment he is pronouncing.

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—No doubt that is so. I am very far from seeking to undervalue the high authority of Mr. Justice Story. I merely make the remark that the statement referred to was not absolutely necessary for the decision of the case. At the same time it decides, no doubt, one point of the case ; I admit that. What he says at page 340 of Wheaton's report is this, "The " question as to the original illegal armament and outfit of the " 'Independencia' may be dismissed in a few words. It is " apparent that, though equipped as a vessel of war, she was " sent to Buenos Ayres on a commercial adventure ; contraband " indeed, but in no shape violating our laws or our national " neutrality. If captured by a Spanish ship of war during the " voyage, she would have been justly condemned as a good prize " and for being engaged in a traffic prohibited by the law of " nations. But there is nothing in our laws or in the law of " nations that forbids."—He must mean in the sense which Mr. Baron Bramwell put upon it, because he has just said it was traffic prohibited by the law of nations, which, at first sight, seems a little inconsistent. "But there is nothing in our laws or in the " law of nations that forbids our citizens from sending armed " vessels as well as munitions of war to foreign ports for sale. It " is a commercial adventure which no nation is bound to prohibit, " and which only exposes the persons engaged in it to the penalty " of confiscation. Supposing therefore the voyage to have been " for commercial purposes, and the sale at Buenos Ayres to have " been a *bonâ fide* sale (and there is nothing in the evidence " before us to contradict it), there is no pretence to say that the " original outfit on the voyage was illegal or that a capture " made after the sale was, for that cause alone, invalid." Now this passage has led to more misapprehension than almost any passage which has been quoted from any American writer, and this has done duty in all the newspapers, as your Lordships are aware, again and again. I apprehend the meaning of the passage to be merely this, there must be the *mens rea*, there must be a guilty intention, at the time the vessel leaves the American port. The person who equipped the "Independencia" had not such an intention ; at all events not a fixed intention ; because he sent out the vessel, certainly not to commit hostilities on its road, but to Buenos Ayres, to get a price for it ; and if the master could

ARGUMENT.

5th Day.

not get a good price for it he was not to sell it. Therefore, there was no definite intention on the part of the equipper; that is the explanation of that case. There was no sufficient proof of *mens rea*. But suppose it had appeared that the vessel had been ordered by the Buenos Ayres Government, there would have been *mens rea* on the part of that Government or its agents, that would have forfeited the vessel quite independently of any question what the equipper did or did not intend; but if he had furnished the vessel under such an order, it would have been considered that he did intend also. I can very well suppose that this passage may be misunderstood by persons not applying their minds to the case. It is very natural to say, if a man sends a ship to Buenos Ayres to sell it, why should not he build it to order; that makes all the difference. If he builds it to order, the party ordering has the *mens rea*, which forfeits the vessel. These cases undoubtedly go some way to open a door to evasions of the Act; we cannot conceal that from ourselves, and I am far from saying that we should be bound by them.

*Lord Chief Baron.*—You say it was to be taken to Buenos Ayres to get a good price. Suppose a man were to make a vessel of war, and to arm her, and were to send her out merely with a crew adequate to sail her with these directions, "Take her if you can to such a port (suppose it were some port either in the Northern or Southern States), and get what price you can for it." Suppose he sells her to one particular belligerent power, not to either, would that be a commercial or a warlike transaction?

*Mr. Solicitor General.*—That is the case of the "Independencia."

*Lord Chief Baron.*—It is not quite that case, she was to be sold to anybody.

*Mr. Solicitor General.*—No; to be sent to Buenos Ayres and sold there.

*Lord Chief Baron.*—If he could get a good price for it. Suppose he was told to take it to the Northern States and sell it for what he could get.

*Mr. Solicitor General.*—I should not think that would make any difference; probably not.

*Lord Chief Baron.*—Yes, because when the owner sent it to be sold to the Northern States, he must perfectly well have known that they would use it for hostilities against the South.

*Mr. Solicitor General.*—He could not possibly tell whether they would buy it or not.

*Lord Chief Baron.*—There could not be any doubt as to the purpose for which it was to be used; if a man took a vessel of war *flagrante bello*, to one of the belligerents to be sold to them, to say he did not absolutely know that they would use it, would be absurd.

*Mr. Baron Pigott.*—In all probability the jury would have found that that was an idle pretence.

*Mr. Solicitor General.*—The question is, the intention.

*Lord Chief Baron.*—It would be sold in order that it might be used if they liked it.

*Mr. Solicitor General.*—I should think the direction to the jury would be, Do you believe he had a fixed intention?

*Lord Chief Baron.*—The word “fixed” is not in the Act.

*Mr. Solicitor General.*—I only use it because it is used in the case of Quincy.

*Mr. Baron Pigott.*—You had better say “intention.”

*Mr. Solicitor General.*—I only used it because it is used in that case. Did he intend that it should be employed by the foreign belligerent power, and then the jury would say whether he had that intent or not; but I believe the meaning of Mr. Justice Story to be, that in this particular case there was not sufficient proof of intention to come within the meaning of the Foreign Enlistment Act. That I apprehend to be the scope of the case, and no more, and I should be very sorry to extend that case; it appears to me to have gone rather far, I confess.

*Mr. Baron Bramwell.*—It is a case rather against you; you do not cite it in your favour.

*Mr. Solicitor General.*—No, my Lord; I am citing it as the strongest case that has been used for the opposite view. I am endeavouring to explain it upon this ground, that upon the particular circumstances of that case the Court thought there was not sufficient proof of a guilty intention, but I should be sorry to see that doctrine extended, and if the same case arose in these Courts it might be a question whether the doctrine would be carried so far; but I was going to observe upon this case that it would be perfectly clear, I apprehend, that if the ship had been ordered by the Buenos Ayres Government the offence would have been complete, and the ship would have been forfeited. I cannot doubt that for a single moment. I have observed upon this case for the purpose of endeavouring to show the precise extent to which it goes, and drawing the line beyond which it does not go. The cases of Quincy and the “Santissima Trinidad” upon the subject of intent, I apprehend, established this doctrine, applicable to the particular facts in those cases, that there must be a positive intention and not merely a wish, not merely a speculation that the ship may possibly be used for a hostile purpose. And let me illustrate it in this way. One or two illustrations have been put by the Lord Chief Baron which may be used as pertinent to the case.

*Mr. Baron Bramwell.*—I cannot help calling your attention to what Mr. Justice Story says here in speaking of the “Altravida.” He says, “Here, then, is complete evidence from the testimony introduced by the claimant himself, of an illegal outfit of the ‘Altravida,’ and an enlistment of her crew within our waters for the purposes of war.”

*Mr. Solicitor General.*—That was when she came back, when her force was augmented; and upon that she was condemned.

ARGUMENT.

5th Day.

*Mr. Baron Bramwell.*—What I meant was that he seemed to consider that that was a necessary thing to make the contract illegal, that it should be “for the purposes of war.”

*Mr. Solicitor General.*—It might be, my Lord, under the words “equip” and “arm.” Your Lordship sees, I think, how this case arose. The vessel was no doubt originally equipped and armed, and sent from Baltimore to Buenos Ayres with the instructions which I have mentioned; she was not condemned on that ground, but she returned to America, and there she received some equipments, but not of a warlike character, no more guns. She took out her guns, and put them in again, but she received some other equipments and she got some men for her tender, and upon those grounds she was condemned; she was condemned by Mr. Justice Story on the ground that her warlike force was augmented, but he says, “With respect to the first voyage I do not condemn her upon that ground, because there was not, as I suggest, sufficient proof of intention on the part of the owners to employ her in warlike service at the time she left America.” That, I apprehend, is the whole scope and effect of the case; but if on the other hand, she had been ordered by a foreign Government, unquestionably she would have been condemned for her original outfit. Then, my Lord, I might illustrate this case of Quincy by a case which was suggested by his Lordship. Suppose we were to enact that if a man fits a skeleton key for the purpose of its being employed by a burglar in housebreaking; suppose he makes the key without any communication with the burglar at all, and merely sends it for sale in the event of his getting a good price for it, it may be said in his favour, you do not prove a guilty intention; but if the burglar orders it, then it is forfeited at once, or if the maker supplies it to order, it is forfeited both on the ground of the *mens rea* on the part of the burglar and of himself. So if he makes it to a certain extent, but is not quite certain whether he will finish it or not. That, I think, is Quincy’s case. He goes to a certain point, and he says, I have not quite made up my mind whether I will finish it for the purpose of using it in this unlawful trade, or for use in some honest trade. You give him the benefit of the doubt; there is a *locus penitentiae* if he has not formed a decided intention. That, I apprehend, is the explanation of those two cases. I have reverted to that point for a moment in consequence of a remark which fell from Mr. Baron Bramwell with reference to the object and intention, and with that branch of the argument I have now done; there must be a fixed intention, and not a mere wish or desire, or calculation of possibility.

*Mr. Baron Channell.*—There must be something which is intention.

*Mr. Solicitor General.*—Yes, as distinguished from what is not intention; that really is the proper way of putting it; a mere speculation is not intention, and the “Independencia” was sent on speculation. If a man builds a ship and sends it abroad upon

mere speculation, that is not such an intention as, according to the American Courts, has been held to be enough.

*Mr. Baron Channell.*—The Attorney General, in summing up, distinctly puts that to the jury.

*Mr. Solicitor General.*—Yes, my Lord. And one word with respect to the mischief contemplated by the Act. It is not very likely when you come to practice that people will very often build or equip ships upon mere speculation, without any communication with foreign Governments; they run a great risk in doing it; they run the risk of detection, and they run the risk of the vessel being stopped on the sea, which is a risk far greater than that applicable to arms and ammunition. Then they run the risk of, when built, the vessel not suiting or not fetching a proper price; so that practically, when you come to consider the mischiefs to be guarded against, it seems to me rather a remote mischief that builders should build ships upon speculation; but the real mischief to be guarded against is that which is likely to happen, namely, a foreign Government, or their agents ordering vessels, and vessels being built to their order. That is what has happened here, no doubt, and when my learned friend said that the Foreign Enlistment Act had not been enforced in this country before, my answer is, that when it was passed it was supposed to be effectual, and that our citizens have not violated the provisions of the Act, so far as we know, until now, and therefore if the present proceeding is new, that is because the offence is new which gives rise to it.

Now, my Lords, I revert to that part of the case upon which I was speaking before, namely, what must be done in pursuance of the intention. The Act says, a person is to “equip, furnish, “fit out, or arm.” I had got so far as this, and I do not wish to go over the same ground again; it is conceded that a vessel need not be so far equipped as to be in a condition to commit hostilities. I have said as much as I mean to say upon that, in other words, that it is not necessary for the ship to be armed. Then, my Lords, we come to this,—what must be the equipment? and here we come to a tolerably distinct issue. My learned friends say that the equipment must be of a distinctively warlike character, though not amounting to actual arming. I say the character of the equipment must be determined by the intention of the equipper, and that is the dispute between us.

Upon that, my Lords, I will take leave once again to refer to the case of the “United States v. Quincy,” and I think it is the last time I shall have occasion to touch upon that case; you will find it at page 79 of the Appendix. What the Court say is this, “The offence consists principally in the intention with “which the preparations were made. These preparations, according to the very terms of the Act, must be made within “the limits of the United States, and it is equally necessary “that the intention with respect to the employment of the vessel “should be formed before she leaves the United States, and this “must be a fixed intention.” (That is the reason why I used the

ARGUMENT.

5th Day.

ARGUMENT.

5th Day.

term "fixed" before "not conditional, or contingent, depending " on some future arrangements.) This intention is a question " belonging exclusively to the jury to decide. It is a material " point on which the legality or criminality of the act must turn, " and decides whether the adventure is of a commercial or war- " like character." Now, I submit to your Lordships that that is correct. As I before observed, I can quite understand the position that a vessel must be equipped so as to commit immediate hostilities; but what is called an equipment of a warlike character, as distinguished from arming, appears to me rather doubtful. I have some difficulty in defining it. It would apply, it appears to me, to very few matters; it would apply possibly to ring bolts for guns, or slides on which guns might move, that would be pretty nearly all the equipments which you could call equipments of an exclusively warlike character.

My Lords, that construction would narrow the effect of the act very much. Let us consider the effect of that construction, and I will take leave to refer first to that provision which prevents a ship being equipped, furnished, fitted out, or armed in order that she may be used as a transport or a store ship. Now, my Lords, it appears to me that if we are to adopt the doctrine of equipments exclusively applicable to some particular object, it would be very difficult to fix upon what equipments would be exclusively applicable to a transport or a store ship.

*Lord Chief Baron.*—No doubt you may use all that by way of illustration, but at the trial, and I think during this argument, the question of its being a store ship or transport did not arise.

*Mr. Solicitor General.*—I do not know that it did, my Lord.

*Lord Chief Baron.*—It was entirely given up. The attention of those who argued the point, and of myself who directed the jury, was limited to the case of an intention to cruise and commit hostilities.

*Mr. Solicitor General.*—No doubt; we do not in the slightest degree say, my Lord, that there was any case against the ship as a transport or store ship. I am dealing now with the construction of the Act, quite independently of its connexion with any particular facts; we have the Act before us and we must put the best construction we can upon it. I am taking this provision which contains the words, equipped, furnished, fitted out, and armed for the purpose of being employed "as a transport or "store ship;" what does that mean? Does that mean equipment (for I will take the word equipment alone) of a character peculiarly adapted to a transport or store ship?

*Lord Chief Baron.*—I own I should rather adopt the policy of the learned Attorney General at the trial. I should say, When the case of a transport comes before me I will form an opinion upon it, but when the case of a transport or store ship is avowedly out of the question, I do not feel myself called upon to say anything upon it to a jury or anybody else.

*Mr. Solicitor General.*—In forming an opinion upon the con-

struction of one part of this section, it is material to consider the other parts of it.

*Lord Chief Baron.*—If you were to write a treatise upon the statute, it would be very important, but here we are discussing only what relates to cruising and committing hostilities.

*Mr. Solicitor General.*—I am discussing what the word “equip” used in the Act means.

*Lord Chief Baron.*—It may mean one thing for one purpose, and another thing for another.

*Mr. Baron Pigott.*—The word “arm” cannot apply to a store ship.

*Mr. Solicitor General.*—Clearly not.

*Lord Chief Baron.*—It is of course indifferent to me whether the matter is in your favour or against you. I am merely looking to what I consider to be the truth.

*Mr. Solicitor General.*—I am quite sure of that, my Lord, but I would venture to think when we are endeavouring to construe the meaning of the words “equip and arm,” and so on, it is not immaterial to refer to what follows in the same clause; and with your Lordships’ permission, I will refer to what follows in the same clause. My contention is this, that if you construe the meaning of the word “equip” in the limited manner which my learned friend contends for, viz., as having *per se* peculiar reference to the prohibited act independently of intention, you land yourself in very great difficulty; if you do not consider intention, in fact you repeal the Act. If you apply this rule to a transport or store ship, it would be almost impossible, or it would be very difficult, at all events, to suggest any peculiar equipment applicable only to a transport or a store ship, and not to any other vessel.

*Mr. Baron Bramwell.*—I do not understand that anybody says that the thing would not be within this Act of Parliament unless it were exclusively calculated for such an object; for instance, if you were to put a great quantity of water on board a vessel, and if you had a great number of hammocks there, which for anything I know, might make the ship applicable to the purpose of a mere passenger ship, still, if the intent with which it was done was that the ship should be used as a transport, it would be within the Act of Parliament, and the party doing it could not say, This is not an equipping exclusively of a store ship or transport character.

*Mr. Solicitor General.*—I say the test, and the only test is the intention; that is my argument.

*Mr. Baron Bramwell.*—What they say in answer to that is, that it must be an intention and something calculated to carry that intention into execution.

*Mr. Solicitor General.*—Yes, my Lord, just so; there I join issue.

*Mr. Baron Bramwell.*—I do not think anybody says that it must be something which can carry that intention only into execution.

ARGUMENT.

5th Day.

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—I took down what my learned friend Sir Hugh Cairns said he deduced as propositions from the summing up; and I understood him to say that one of the propositions was this, that although the vessel need not be armed, still the equipment must be of a warlike character.

*Lord Chief Baron.*—The equipment of a transport so as to make it available in a warlike expedition for the purposes of a transport, is of a warlike character. I am merely giving you what I suppose Sir Hugh Cairns meant, namely, that when you equip and fit out a transport as a transport, to be used as a transport in a warlike expedition, you do fit it out in a warlike character.

*Mr. Solicitor General.*—I do not know that my learned friend Sir Hugh Cairns meant to say that the equipment of a transport must be of a warlike character, but he meant to say that the equipment of a vessel to cruise must be of a warlike character—that is their contention; and I say that it is not so; that is to say, it is not so in one sense although it is in another. If by warlike character you mean the character put upon it by the intention, I agree. And then, in this case there was manifestly that character beyond all doubt. But if by warlike character you mean something which, independently of a proof of intention, is of a warlike character, then I differ; and that really is the point.

*Mr. Baron Bramwell.*—That is the question.

*Mr. Solicitor General.*—Yes, my Lord. By a “warlike character” my learned friend means something which, independently of the intention, would appear to be applicable to war, and if not exclusively applicable to war, at all events more applicable to war than to other purposes, unless he means nothing. I do not see what else he can mean than that, without acceding to my proposition. I say that if there was any equipment whatever, and you show that it was intended for warlike purposes, that will do. My learned friend says, no, it must be an equipment, which would be a proof of an intention for war to constitute a warlike character. There I differ, and I am endeavouring to illustrate the construction of the statute by applying this doctrine to transports or store ships. With respect to transports and store ships, it appears to me impossible to contend that the equipment must be of a character peculiarly suitable to transports or store ships. I say, that an “equipment,” *ancipitis usus* is explained by intent. You find a ship fitted up to carry a vast number of people, that might either be for emigrants or for troops. Surely if you show that the intention was to carry troops, that would at once determine the nature of the equipment, and make it an equipment as a troop ship. I apprehend that to hold anything else would be in effect to repeal this part of the statute.

So, again, with respect to a store ship, the kind of equipment which would enable a ship to carry government stores would enable her to carry other stores. The equipment must necessarily



be *incipit usus*. The character of the equipment is proved by the intent. Suppose you prove that certain fittings in a hold are made in a manner suitable to carry government stores, yet they might carry 500 things besides; if you prove that they are intended to carry government stores, that is an equipment as a store ship. Any other construction would render it impossible to prove that a ship was intended for a transport or a store ship. I take it that any merchantman might be taken and with very few adaptations indeed made applicable to the purposes of a store ship. If you could not explain those adaptations by the intention, you never would be able to show any equipment at all applicable to a transport or store ship. Then, my Lords, I contend that to maintain that equipments are not explainable by evidence of the equipper's intent, but must, on the face of them, be adapted for any particular purpose, is contrary to the true construction of this statute, and would, at all events, defeat the intention of the provision with respect to transports or store ships.

ARGUMENT.

5th Day.

Now, my Lords, I next come to the second object with which it is forbidden to equip a vessel, namely, to be employed in the service of a foreign Government, to cruise and commit hostilities; and I say, there you must not require any distinctive equipments or preparations peculiarly adapted on the face of them, and necessarily so, to cruise or commit hostilities, but that any equipment must be judged by the intention. In the first place take the word "equipping." Equipping would, I suppose, include manning, as my learned friend the Attorney General has suggested. You find a crew hired; that is in itself doubtful; they may be hired to take care of the ship, or to take care of the cargo, or to fight. Supposing you prove that they were intended to fight, I say then, that becomes an equipment in violation of this Act, although there is nothing on the face of their engagement to show whether they were intended to fight or not. But the intention, as is said in the case of Quincy, determines the character of the act. I do not see what other test you can have but the intention.

My Lords, I might put a number of other cases. Take the case of a merchant vessel that is lengthened, and has new boilers put in her in order to give her greater speed, for the purpose of capturing other vessels, she not being useful for that purpose before. If you showed that she was lengthened and additional boilers put in her, and so on, for the purpose of enabling her to capture other vessels, and if that was stated by the equipper, I should say that that was an equipping with the intention that she should be employed to cruise and commit hostilities, although it would be *incipit usus*, unquestionably. If I might again borrow my Lord's illustration, take the case of a burglar. Suppose he goes and gets a pair of list shoes and a chisel, and, puts them in his pocket for the purpose of committing a burglary I say he is burglariously equipped, although the articles may be *incipit usus*. The list shoes anybody who has had the gout

*Assumes* knows are exceedingly useful things for wear; or they may be for the purpose of preventing an invalid from hearing your steps; but if they are for the purpose of enabling the man to break into the house, the purpose changes the character of them, and they are burglarious equipments.

*3rd Day.* *Mr. Baron Bramwell.*—I am not sure that there is not a case against you there.

*Mr. Solicitor General.*—I am supposing the shoes to be for-

*Mr. Baron Bramwell.*—There was a case (I do not know whether it is worth while referring to it) in the Court of Criminal Appeal, where upon an indictment under the statute 24 and 25 Victoria, chapter 97, which renders it a misdemeanor to be found at night armed with intent to break or force into any house or building, and commit a felony therein, "it was held to be necessary that a person should be proved to have had an intent of breaking into or entering some particular building;" the proof of a general intent to enter houses was not sufficient.

*Mr. Solicitor General.*—I was assuming the proof of an intent to break into a particular house,—it would not make the least difference to my argument,—I will assume the man to get those equipments, as I will call them, which are *ancipitis usus*, and perfectly lawful to a honest man, with the intention of breaking into a house; I should say that the character of the equipments is determined by the act, and they would be, to use the phrase I employed before, burglarious equipments. I do not see what other rule of construction is really applicable or leads to any clear or definite solution of the meaning of this Act.

My Lords, I may remind you that we desire no more than to take the words of the Act; but my learned friends desire to interpolate words. My learned friend said that the equipments, &c. must be as a ship of war; that was several times said by my learned friend. There are no such words in the Act, the words are, "equip, furnish, fit out, or arm;" if that stood alone, any equipment enabling a vessel to sail would be of course prohibited.

*Lord Chief Baron.*—There are other words. If I recollect rightly the argument of Sir Hugh Cairns, it was this,—she must be "fitted out" and so on, in order that she might cruise and commit hostilities.

*Mr. Solicitor General.*—Just so, my Lord, in order that she may be employed—

*Lord Chief Baron.*—Sir Hugh Cairns' argument was this: If she is not fitted out so as to be by possibility able to cruise and commit hostilities, she is not fitted out within the intention of the Act; that is his argument.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—Then, do not you see that Sir Hugh Cairns introduces no word into the Act of Parliament at all? What he says is this, you cannot either fit out, furnish, or equip

a vessel that it may cruise and commit hostilities unless it is in a condition to do so. ARGUMENT.

*Mr. Solicitor General.*—I know he says that, my Lord; you see how far that would take him. 5th Day.

*Lord Chief Baron.*—Do not suppose that I am adopting his view at all. I am pointing out that Sir Hugh Cairns did not introduce any words into the Act of Parliament. It is a mistake, I think, to suppose that the argument of Sir Hugh Cairns requires the introduction of any words; he says, If the vessel is to be fitted out, furnished, or equipped, in order that it may cruise or commit hostilities, it must be fitted out in a manner to do so; otherwise the thing is not done which the Act requires. That is his argument.

*Mr. Solicitor General.*—My observation referred to what was said by my learned friend Sir Hugh Cairns, and I took down his words, that she must be equipped "as a man-of-war;" I was only dealing with that at this moment. I have already said, that in order to contend that she must be in a condition to cruise and commit hostilities, he must contend that she must be armed. I have before dealt with that argument.

*Mr. Baron Channell.*—I should like to call your attention to a difficulty which strikes me. Suppose this information had not in terms proceeded against any person of those whom I have called the subordinate actors, but had gone only against those who were the principal actors; and suppose that, instead of charging that there was an equipment here with intent that the vessel should be employed in cruising and committing hostilities, it had taken one of the other classes, and charged it to be an equipment with intent that the ship should be employed as a transport or store ship, and had alleged, not that anybody assisted or endeavoured to do that, but had alleged the act itself, the equipping of the ship as a transport ship, or the equipping of it as a store ship; what I understand Mr. Mellish's argument to be is this, If you had merely alleged in your information, you have equipped the ship as a store ship, that would not do; you must go on to add something further, namely, that it was the intention that the vessel so equipped as a store ship should be employed in a particular service, and all those allegations must be introduced into the information or indictment. Before you get to any evidence as to intent, or to see what the effect of the evidence as to intent may be, you must first establish, by proceeding against the principal actors, that there was an equipping of the ship as a store ship. His argument, as I understand it, comes to this: dismissing for a moment all question of intent, you must see in the ship itself some equipment or partial equipment of the ship in the character of a transport or a store ship, and then you will have to go further into the inquiry as to intent.

*Mr. Solicitor General.*—That appears to me to be a difficulty.

*Mr. Baron Channell.*—Your argument is that an equipment may be for one or the other purpose, but that the intent gives

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—I took down what my learned friend Sir Hugh Cairns said he deduced as propositions from the summing up; and I understood him to say that one of the propositions was this, that although the vessel need not be armed, still the equipment must be of a warlike character.

*Lord Chief Baron.*—The equipment of a transport so as to make it available in a warlike expedition for the purposes of a transport, is of a warlike character. I am merely giving you what I suppose Sir Hugh Cairns meant, namely, that when you equip and fit out a transport as a transport, to be used as a transport in a warlike expedition, you do fit it out in a warlike character.

*Mr. Solicitor General.*—I do not know that my learned friend Sir Hugh Cairns meant to say that the equipment of a transport must be of a warlike character, but he meant to say that the equipment of a vessel to cruize must be of a warlike character—that is their contention; and I say that it is not so; that is to say, it is not so in one sense although it is in another. If by warlike character you mean the character put upon it by the intention, I agree. And then, in this case there was manifestly that character beyond all doubt. But if by warlike character you mean something which, independently of a proof of intention, is of a warlike character, then I differ; and that really is the point.

*Mr. Baron Bramwell.*—That is the question.

*Mr. Solicitor General.*—Yes, my Lord. By a “warlike character” my learned friend means something which, independently of the intention, would appear to be applicable to war, and if not exclusively applicable to war, at all events more applicable to war than to other purposes, unless he means nothing. I do not see what else he can mean than that, without acceding to my proposition. I say that if there was any equipment whatever, and you show that it was intended for warlike purposes, that will do. My learned friend says, no, it must be an equipment, which would be a proof of an intention for war to constitute a warlike character. There I differ, and I am endeavouring to illustrate the construction of the statute by applying this doctrine to transports or store ships. With respect to transports and store ships, it appears to me impossible to contend that the equipment must be of a character peculiarly suitable to transports or store ships. I say, that an “equipment,” *ancipitis usus* is explained by intent. You find a ship fitted up to carry a vast number of people, that might either be for emigrants or for troops. Surely if you show that the intention was to carry troops, that would at once determine the nature of the equipment, and make it an equipment as a troop ship. I apprehend that to hold anything else would be in effect to repeal this part of the statute.

So, again, with respect to a store ship, the kind of equipment which would enable a ship to carry government stores would enable her to carry other stores. The equipment must necessarily

be *incipit usus*. The character of the equipment is proved by the intent. Suppose you prove that certain fittings in a hold are made in a manner suitable to carry government stores, yet they might carry 500 things besides; if you prove that they are intended to carry government stores, that is an equipment as a store ship. Any other construction would render it impossible to prove that a ship was intended for a transport or a store ship. I take it that any merchantman might be taken and with very few adaptations indeed made applicable to the purposes of a store ship. If you could not explain those adaptations by the intention, you never would be able to show any equipment at all applicable to a transport or store ship. Then, my Lords, I contend that to maintain that equipments are not explainable by evidence of the equipper's intent, but must, on the face of them, be adapted for any particular purpose, is contrary to the true construction of this statute, and would, at all events, defeat the intention of the provision with respect to transports or store ships.

ARGUMENT.

5th Day.

Now, my Lords, I next come to the second object with which it is forbidden to equip a vessel, namely, to be employed in the service of a foreign Government, to cruise and commit hostilities; and I say, there you must not require any distinctive equipments or preparations peculiarly adapted on the face of them, and necessarily so, to cruise or commit hostilities, but that any equipment must be judged by the intention. In the first place take the word "equipping." Equipping would, I suppose, include manning, as my learned friend the Attorney General has suggested. You find a crew hired; that is in itself doubtful; they may be hired to take care of the ship, or to take care of the cargo, or to fight. Supposing you prove that they were intended to fight, I say then, that becomes an equipment in violation of this Act, although there is nothing on the face of their engagement to show whether they were intended to fight or not. But the intention, as is said in the case of Quincy, determines the character of the act. I do not see what other test you can have but the intention.

My Lords, I might put a number of other cases. Take the case of a merchant vessel that is lengthened, and has new boilers put in her in order to give her greater speed, for the purpose of capturing other vessels, she not being useful for that purpose before. If you showed that she was lengthened and additional boilers put in her, and so on, for the purpose of enabling her to capture other vessels, and if that was stated by the equipper, I should say that that was an equipping with the intention that she should be employed to cruise and commit hostilities, although it would be *incipit usus*, unquestionably. If I might again borrow my Lord's illustration, take the case of a burglar. Suppose he goes and gets a pair of list shoes and a chisel, and, puts them in his pocket for the purpose of committing a burglary I say he is burglariously equipped, although the articles may be *incipit usus*. The list shoes anybody who has had the gout

Answer.

5th Day.

knows are exceedingly useful things for wear ; or they may be for the purpose of preventing an invalid from hearing your steps ; but if they are for the purpose of enabling the man to break into the house, the purpose changes the character of them, and they are burglarious equipments.

*Mr. Baron Bramwell.*—I am not sure that there is not a case against you there.

*Mr. Solicitor General.*—I am supposing the shoes to be forfeited.

*Mr. Baron Bramwell.*—There was a case (I do not know whether it is worth while referring to it) in the Court of Criminal Appeal, where upon an indictment under the statute 24 and 25 Victoria, chapter 97, which renders it a misdemeanor to be found at night armed with intent to break or force into any house or building, and commit a felony therein, "it was held to be necessary that a person should be proved to have had an intent of breaking into or entering some particular building ;" the proof of a general intent to enter houses was not sufficient.

*Mr. Solicitor General.*—I was assuming the proof of an intent to break into a particular house,—it would not make the least difference to my argument,—I will assume the man to get those equipments, as I will call them, which are *ancipitis usus*, and perfectly lawful to a honest man, with the intention of breaking into a house ; I should say that the character of the equipments is determined by the act, and they would be, to use the phrase I employed before, burglarious equipments. I do not see what other rule of construction is really applicable or leads to any clear or definite solution of the meaning of this Act.

My Lords, I may remind you that we desire no more than to take the words of the Act ; but my learned friends desire to interpolate words. My learned friend said that the equipments, &c. must be as a ship of war ; that was several times said by my learned friend. There are no such words in the Act, the words are, "equip, furnish, fit out, or arm ;" if that stood alone, any equipment enabling a vessel to sail would be of course prohibited.

*Lord Chief Baron.*—There are other words. If I recollect rightly the argument of Sir Hugh Cairns, it was this,—she must be "fitted out" and so on, in order that she might cruize and commit hostilities.

*Mr. Solicitor General.*—Just so, my Lord, in order that she may be employed—

*Lord Chief Baron.*—Sir Hugh Cairns' argument was this : If she is not fitted out so as to be by possibility able to cruize and commit hostilities, she is not fitted out within the intention of the Act ; that is his argument.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—Then, do not you see that Sir Hugh Cairns introduces no word into the Act of Parliament at all ? What he says is this, you cannot either fit out, furnish, or equip

a vessel that it may cruise and commit hostilities unless it is in a condition to do so. ARGUMENT.

*Mr. Solicitor General.*—I know he says that, my Lord; you see how far that would take him. 5th Day.

*Lord Chief Baron.*—Do not suppose that I am adopting his view at all. I am pointing out that Sir Hugh Cairns did not introduce any words into the Act of Parliament. It is a mistake, I think, to suppose that the argument of Sir Hugh Cairns requires the introduction of any words; he says, If the vessel is to be fitted out, furnished, or equipped, in order that it may cruise or commit hostilities, it must be fitted out in a manner to do so; otherwise the thing is not done which the Act requires. That is his argument.

*Mr. Solicitor General.*—My observation referred to what was said by my learned friend Sir Hugh Cairns, and I took down his words, that she must be equipped “as a man-of-war;” I was only dealing with that at this moment. I have already said, that in order to contend that she must be in a condition to cruise and commit hostilities, he must contend that she must be armed. I have before dealt with that argument.

*Mr. Baron Channell.*—I should like to call your attention to a difficulty which strikes me. Suppose this information had not in terms proceeded against any person of those whom I have called the subordinate actors, but had gone only against those who were the principal actors; and suppose that, instead of charging that there was an equipment here with intent that the vessel should be employed in cruising and committing hostilities, it had taken one of the other classes, and charged it to be an equipment with intent that the ship should be employed as a transport or store ship, and had alleged, not that anybody assisted or endeavoured to do that, but had alleged the act itself, the equipping of the ship as a transport ship, or the equipping of it as a store ship; what I understand Mr. Mellish’s argument to be is this, If you had merely alleged in your information, you have equipped the ship as a store ship, that would not do; you must go on to add something further, namely, that it was the intention that the vessel so equipped as a store ship should be employed in a particular service, and all those allegations must be introduced into the information or indictment. Before you get to any evidence as to intent, or to see what the effect of the evidence as to intent may be, you must first establish, by proceeding against the principal actors, that there was an equipping of the ship as a store ship. His argument, as I understand it, comes to this: dismissing for a moment all question of intent, you must see in the ship itself some equipment or partial equipment of the ship in the character of a transport or a store ship, and then you will have to go further into the inquiry as to intent.

*Mr. Solicitor General.*—That appears to me to be a difficulty.

*Mr. Baron Channell.*—Your argument is that an equipment may be for one or the other purpose, but that the intent gives

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—I took down what my learned friend Sir Hugh Cairns said he deduced as propositions from the summing up; and I understood him to say that one of the propositions was this, that although the vessel need not be armed, still the equipment must be of a warlike character.

*Lord Chief Baron.*—The equipment of a transport so as to make it available in a warlike expedition for the purposes of a transport, is of a warlike character. I am merely giving you what I suppose Sir Hugh Cairns meant, namely, that when you equip and fit out a transport as a transport, to be used as a transport in a warlike expedition, you do fit it out in a warlike character.

*Mr. Solicitor General.*—I do not know that my learned friend Sir Hugh Cairns meant to say that the equipment of a transport must be of a warlike character, but he meant to say that the equipment of a vessel to cruise must be of a warlike character—that is their contention; and I say that it is not so; that is to say, it is not so in one sense although it is in another. If by warlike character you mean the character put upon it by the intention, I agree. And then, in this case there was manifestly that character beyond all doubt. But if by warlike character you mean something which, independently of a proof of intention, is of a warlike character, then I differ; and that really is the point.

*Mr. Baron Bramwell.*—That is the question.

*Mr. Solicitor General.*—Yes, my Lord. By a “warlike character” my learned friend means something which, independently of the intention, would appear to be applicable to war, and if not exclusively applicable to war, at all events more applicable to war than to other purposes, unless he means nothing. I do not see what else he can mean than that, without acceding to my proposition. I say that if there was any equipment whatever, and you show that it was intended for warlike purposes, that will do. My learned friend says, no, it must be an equipment, which would be a proof of an intention for war to constitute a warlike character. There I differ, and I am endeavouring to illustrate the construction of the statute by applying this doctrine to transports or store ships. With respect to transports and store ships, it appears to me impossible to contend that the equipment must be of a character peculiarly suitable to transports or store ships. I say, that an “equipment,” *ancipitis usus* is explained by intent. You find a ship fitted up to carry a vast number of people, that might either be for emigrants or for troops. Surely if you show that the intention was to carry troops, that would at once determine the nature of the equipment, and make it an equipment as a troop ship. I apprehend that to hold anything else would be in effect to repeal this part of the statute.

So, again, with respect to a store ship, the kind of equipment which would enable a ship to carry government stores would enable her to carry other stores. The equipment must necessarily



be *ancipitis usus*. The character of the equipment is proved by the intent. Suppose you prove that certain fittings in a hold are made in a manner suitable to carry government stores, yet they might carry 500 things besides; if you prove that they are intended to carry government stores, that is an equipment as a store ship. Any other construction would render it impossible to prove that a ship was intended for a transport or a store ship. I take it that any merchantman might be taken and with very few adaptations indeed made applicable to the purposes of a store ship. If you could not explain those adaptations by the intention, you never would be able to show any equipment at all applicable to a transport or store ship. Then, my Lords, I contend that to maintain that equipments are not explainable by evidence of the equipper's intent, but must, on the face of them, be adapted for any particular purpose, is contrary to the true construction of this statute, and would, at all events, defeat the intention of the provision with respect to transports or store ships.

ARGUMENT.

5th Day.

Now, my Lords, I next come to the second object with which it is forbidden to equip a vessel, namely, to be employed in the service of a foreign Government, to cruize and commit hostilities; and I say, there you must not require any distinctive equipments or preparations peculiarly adapted on the face of them, and necessarily so, to cruize or commit hostilities, but that any equipment must be judged by the intention. In the first place take the word "equipping." Equipping would, I suppose, include manning, as my learned friend the Attorney General has suggested. You find a crew hired; that is in itself doubtful; they may be hired to take care of the ship, or to take care of the cargo, or to fight. Supposing you prove that they were intended to fight, I say then, that becomes an equipment in violation of this Act, although there is nothing on the face of their engagement to show whether they were intended to fight or not. But the intention, as is said in the case of Quincy, determines the character of the act. I do not see what other test you can have but the intention.

My Lords, I might put a number of other cases. Take the case of a merchant vessel that is lengthened, and has new boilers put in her in order to give her greater speed, for the purpose of capturing other vessels, she not being useful for that purpose before. If you showed that she was lengthened and additional boilers put in her, and so on, for the purpose of enabling her to capture other vessels, and if that was stated by the equipper, I should say that that was an equipping with the intention that she should be employed to cruize and commit hostilities, although it would be *ancipitis usus*, unquestionably. If I might again borrow my Lord's illustration, take the case of a burglar. Suppose he goes and gets a pair of list shoes and a chisel, and, puts them in his pocket for the purpose of committing a burglary I say he is burglariously equipped, although the articles may be *ancipitis usus*. The list shoes anybody who has had the gout

**Argument.**

**5th Day.**

knows are exceedingly useful things for wear ; or they may be for the purpose of preventing an invalid from hearing your steps ; but if they are for the purpose of enabling the man to break into the house, the purpose changes the character of them, and they are burglarious equipments.

*Mr. Baron Bramwell.*—I am not sure that there is not a case against you there.

*Mr. Solicitor General.*—I am supposing the shoes to be forfeited.

*Mr. Baron Bramwell.*—There was a case (I do not know whether it is worth while referring to it) in the Court of Criminal Appeal, where upon an indictment under the statute 24 and 25 Victoria, chapter 97, which renders it a misdemeanor to be found at night armed with intent to break or force into any house or building, and commit a felony therein, "it was held to be necessary that a person should be proved to have had an intent of breaking into or entering some particular building ;" the proof of a general intent to enter houses was not sufficient.

*Mr. Solicitor General.*—I was assuming the proof of an intent to break into a particular house,—it would not make the least difference to my argument,—I will assume the man to get those equipments, as I will call them, which are *incipit* *usus*, and perfectly lawful to a honest man, with the intention of breaking into a house ; I should say that the character of the equipments is determined by the act, and they would be, to use the phrase I employed before, burglarious equipments. I do not see what other rule of construction is really applicable or leads to any clear or definite solution of the meaning of this Act.

My Lords, I may remind you that we desire no more than to take the words of the Act ; but my learned friends desire to interpolate words. My learned friend said that the equipments, &c. must be as a ship of war ; that was several times said by my learned friend. There are no such words in the Act, the words are, "equip, furnish, fit out, or arm ;" if that stood alone, any equipment enabling a vessel to sail would be of course prohibited.

*Lord Chief Baron.*—There are other words. If I recollect rightly the argument of Sir Hugh Cairns, it was this,—she must be "fitted out" and so on, in order that she might cruize and commit hostilities.

*Mr. Solicitor General.*—Just so, my Lord, in order that she may be employed—

*Lord Chief Baron.*—Sir Hugh Cairns' argument was this : If she is not fitted out so as to be by possibility able to cruize and commit hostilities, she is not fitted out within the intention of the Act ; that is his argument.

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—Then, do not you see that Sir Hugh Cairns introduces no word into the Act of Parliament at all ? What he says is this, you cannot either fit out, furnish, or equip

a vessel that it may cruise and commit hostilities unless it is in a condition to do so. Argument.

*Mr. Solicitor General.*—I know he says that, my Lord; you see how far that would take him. 5th Day.

*Lord Chief Baron.*—Do not suppose that I am adopting his view at all. I am pointing out that Sir Hugh Cairns did not introduce any words into the Act of Parliament. It is a mistake, I think, to suppose that the argument of Sir Hugh Cairns requires the introduction of any words; he says, If the vessel is to be fitted out, furnished, or equipped, in order that it may cruise or commit hostilities, it must be fitted out in a manner to do so; otherwise the thing is not done which the Act requires. That is his argument.

*Mr. Solicitor General.*—My observation referred to what was said by my learned friend Sir Hugh Cairns, and I took down his words, that she must be equipped "as a man-of-war;" I was only dealing with that at this moment. I have already said, that in order to contend that she must be in a condition to cruise and commit hostilities, he must contend that she must be armed. I have before dealt with that argument.

*Mr. Baron Channell.*—I should like to call your attention to a difficulty which strikes me. Suppose this information had not in terms proceeded against any person of those whom I have called the subordinate actors, but had gone only against those who were the principal actors; and suppose that, instead of charging that there was an equipment here with intent that the vessel should be employed in cruising and committing hostilities, it had taken one of the other classes, and charged it to be an equipment with intent that the ship should be employed as a transport or store ship, and had alleged, not that anybody assisted or endeavoured to do that, but had alleged the act itself, the equipping of the ship as a transport ship, or the equipping of it as a store ship; what I understand Mr. Mellish's argument to be is this, If you had merely alleged in your information, you have equipped the ship as a store ship, that would not do; you must go on to add something further, namely, that it was the intention that the vessel so equipped as a store ship should be employed in a particular service, and all those allegations must be introduced into the information or indictment. Before you get to any evidence as to intent, or to see what the effect of the evidence as to intent may be, you must first establish, by proceeding against the principal actors, that there was an equipping of the ship as a store ship. His argument, as I understand it, comes to this: dismissing for a moment all question of intent, you must see in the ship itself some equipment or partial equipment of the ship in the character of a transport or a store ship, and then you will have to go further into the inquiry as to intent.

*Mr. Solicitor General.*—That appears to me to be a difficulty.

*Mr. Baron Channell.*—Your argument is that an equipment may be for one or the other purpose, but that the intent gives

**ARGUMENT.** such a character to the equipment that it is then made to be an equipment for a transport ship and in order to be so employed.

**5th Day.**

*Mr. Solicitor General.*—Yes, my Lord, the intent is that she shall be so employed; and I say when you see certain equipments (I am now dealing with the case of transports or store ships) which might do for a transport or store ship, or which might do for an emigrant ship or a merchant vessel, you determine the character of the equipment by the intention, and if she is intended to be employed in the service of a foreign Government as a transport or store ship by one belligerent against another, that equipment is enough. My learned friend again and again used the expression "*as a transport*," or "*as a store ship*," or "*as a ship of war*," as if those expressions were in the Act. Those expressions are not in the Act; there are no such expressions in the Act. I am only dealing with the observations of my learned friend so far as they relate to those expressions.

*Mr. Baron Channell.*—Just so. You are right. It is not to equip a ship *as a transport*, it is to equip a ship to be employed *as a store ship or transport*. I just gave you what had occurred to my mind (do not suppose I am intimating any opinion) with regard to the information. I understand it to contain three propositions: first, to equip; secondly, subject to your last observation, to equip a ship as a transport or store ship; thirdly, with intent that she should be employed in a particular way. Then Mr. Mellish contends that the second proposition is not made out if you show some equipment applicable to any ship, but not exclusively to a transport or store ship. When the Government take up merchant ships to transport troops or convicts there are a number of temporary rooms fitted up for the accommodation of the men. You may at once say, I see that that ship is fitted up to carry convicts or troops, because she is not fitted up as a vessel of war nor as a merchant vessel; she has only stowage room enough to carry provisions. Upon such facts he would say, I should contend that she is fitted up as a transport ship or as a ship to carry stores; that is what he says.

*Mr. Solicitor General.*—It appears to me that there is a good deal of difficulty about it, as I have endeavoured to show your Lordships. If I may express it in these words, I think I shall meet your Lordship's meaning, and that of my learned friends; There must be something in the equipments on the face of them purporting to be peculiarly adapted for a transport, or a store ship; it appears to me that it might be extremely difficult to say what equipments on the face of them would bear such a character.

*Mr. Baron Channell.*—Suppose there is no war going on at all, so that there could be no hostile cruising, or any employment of the ship as a transport, or for aggressive purposes, would you then say that that ship was fitted out as a transport or store ship? That is the difficulty.

*Mr. Baron Pigott.*—Mr. Mellish gave an illustration, that you must find harpoons on board a whaler; that is a very good illustration.

*Mr. Solicitor General.*—Yes, my Lord ; or it might be said, if you find pontoons on board a store ship, that would show that the stores were intended for an army ; that would be a very decided case, but there would be possibly very few such cases. Moreover the harpoons, in the case of the whaler, would be, I should think, hardly fittings ; they would be in the nature of arms for a particular purpose taken in the ship, and if there were fittings particularly adapted for the stowage of harpoons, it would be an equipment of a distinctive character. But I do not think you could expect that often. The same adaptations that would do to carry troops, infantry we will say, would do for emigrants. It would be very difficult to distinguish the one from the other. I ventured to put a case to your Lordships. Suppose equipments, as to which it would be difficult to say whether they are intended for emigrants or troops, of which possibly the distinctive character could not be determined till the troops came on board, would you wait till the troops were on board ; would not you seize the ship supposing the equipper were to say, I mean those equipments for troops ? I take the case of what happened here, or nearly the same. “I mean those for troops,” says the equipper. Would not that be an equipment for troops ? I apprehend that it would be the best possible evidence of the character of the equipment, and that the character *per se* must generally be extremely doubtful.

ARGUMENT.

5th Day.

Now, my Lords, passing from a transport to a store ship, what would you expect to find ? She might carry any sort of stores, not necessarily shot or shells, but boots and clothing, or anything else ; the same fittings that would do for boots and clothing would do for almost any kinds of merchandise. Are you to wait till the boots and clothing are put on board to determine the character of the equipment ? No. Your object is prevention. Supposing the equipper said, “I intend these fittings for boots and trowsers for troops,” I imagine that that intention would determine the character of the equipment. That appears to me to be a much plainer construction, and a much easier and simpler construction, than to say there must be something in the equipments, on the face of them, indicating that they are meant for a particular purpose. That I say is not in the words of the Act, the words of the Act are not “as a transport or store ship,” &c., but “in order that the vessel may be employed in the service of a foreign prince or state,” for a certain purpose. Then if you have the two—I am now dealing with the literal words of the Act—if you have the equipping, and if you have also the intention that the vessel shall be employed in the service of a foreign prince, you have the two things mentioned in the Act concurring ; you do not want more. So that, as I venture to put it, my learned friend’s interpretation does virtually require an addition to the words of the Act.

Upon the subject of equipping, I may be allowed to say that it does not appear to me that equipping is necessarily confined

ARGUMENT.  
 5th Day.

to what is additional to structure, but I should contend with my learned friend the Attorney General that it is applicable to mere structure. I do not wish to repeat what he said upon the subject, that supposing always you prove a design and intention that the vessel shall be employed to cruize and commit hostilities, and that she shall be equipped, anything done in pursuance of that design, even in building the vessel by contract, adapted to that equipment, and in furtherance of that design, is within the meaning of the Act.

If the intention is to stop at building, it may be that building would not be within the meaning of the Act, but if the intention is to fit out (I am using that as the most comprehensive word), then anything done in pursuance of the intention would be a fitting out. And without recurring to the illustrations I have before put, I venture to think that, with regard to transport or store ships, the making the decks wider in order to carry horses, although that would be a part of the structure of the vessel, would still be an equipment of the ship as a transport or store ship. If you wish the vessel to make a capture, and you alter the shape of her prow, and make her longer, and add a screw propeller, those are structural equipments *per se*, *ancipitis usus*, but they are for the purpose of her cruizing and committing hostilities, and they are therefore equipments within the Act. That is the interpretation I venture to put upon the Act, and I submit that there may be equipments by construction as well as equipments by the addition of hammock nettings and a variety of articles of that sort. Indeed in this case there were unquestioned equipments, I take it, and there can be no doubt whatever that the ship was intended to be so far equipped as to take the sea. No human being can doubt that; but she probably was not intended to have her arms put on board her; that, I think, is a fair supposition. If any of those equipments were *ancipitis usus*, that would be explainable by the intention. And I submit that the true construction of the Act is to explain the nature of equipments which are ambiguous by the intention of the equipper.

My Lords, I will only observe further upon this, that two or three cases in the United States decided upon the construction of their Slave Trade Acts quite bear out this view. My learned friend the Attorney General referred to one of those cases yesterday. That was the case of the United States against Gooding. I will not refer to that again. I have no doubt that is in your Lordships' recollection. That was a case of an indictment, and the indictment there was against Gooding for "fitting out;" that was the word used. I know that there are other words in the Act. There are the words "build" and "prepare," but "fitting out" was the charge. Gooding fitted out, although he used no equipments peculiarly calculated for the slave trade.

The same doctrine was held in the Platsburg case, in the 10th volume of Wheaton's Reports, page 133. I am now about to quote from the judgment.

*Mr. Baron Channell.*—Does that give the words of the Act?

ARGUMENT.

*Mr. Solicitor General.*—The words of the Act are, as I recollect them, “build, equip, fit out, or otherwise prepare.”

4th Day.

*Mr. Baron Channell.*—Prepare for what?

*Mr. Solicitor General.*—For the slave trade; but I will give your Lordship the words of the Act; they were read yesterday by my learned friend the Attorney General.

*Mr. Baron Channell.*—When the learned Attorney General cited the case yesterday, I had not the distinction in my mind so clearly as I have now, that it is not to equip a ship as a store ship, but to equip a ship to be “used or employed.”

*Mr. Attorney General.*—My Lords, I find in the print of what I said to your Lordships yesterday, that the words of the Act are stated from the Act. This is the passage—“The Act contains large words. It ‘prohibited, under penalties, any citizen or ‘citizens of the United States, or any other person or persons,’” “from doing these things:—no such person ‘shall for himself, ‘themselves, or any other person or persons whatsoever, either ‘as master, factor, or owner, build, fit,’”—I said that the word “out” had slipped out there, for it is found in the subsequent words in all the clauses, therefore I read it as if it were there, “fit out, equip, load, or otherwise prepare any ship or vessel in “any port or place within the jurisdiction of the United States, “nor cause any such ship or vessel to sail from any port or place “whatsoever, within the jurisdiction of the same, for the purpose of procuring any negro, mulatto, or person of colour from “any foreign kingdom, place, or country, to be transported to “any port or place whatsoever, to be held, sold, or otherwise “disposed of as slaves, or to be held to service or labour.”

*Mr. Solicitor General.*—“For the purpose,” in that Act, appears to be substituted for “in order that,” in this. I apprehend the meaning will be very much the same. The case my learned friend yesterday referred to, as your Lordships are aware, turned upon the meaning of “fit out,” and that was an indictment. This was a question of the forfeiture of a vessel, and what is said in that judgment is this. I may remark that there was proof here of a barrel of handcuffs beyond doubt; but they say, “Assuming the equipments were all innocent in their own “nature, that would not help the case, if there were positive “proof of a guilty intention. The law does not proceed upon “the notion that provisions or equipments which are adapted to “ordinary voyages are not within the forbidding clause, if they “are intended for carrying on the slave trade, nor is it necessary “that there should be complete equipments for this purpose. It “is sufficient if any preparations are made for an unlawful purpose. Such was the doctrine of this Court in the cases formerly “adjudged, and which were cited at the bar.”

Now, my Lords, I cannot help thinking that that is the obvious and rational construction, and it is in accordance with the construction of criminal statutes. The main thing to

ARGUMENT.

5th Day.

ascertain is the *mens rea*, and then the facts are judged by the light thrown upon them, and I cannot conceive any hardship upon anybody if what he does is viewed by the light of his intention. You must be always liable to error in determining what equipments are or are not upon the face of them fitted for a transport or store ship, or for a ship of war. You may have difference of opinion and conflicting testimony, but if you once arrive at the fact that the man making them intended them for the one or the other purpose, it appears to me that you have the most complete evidence and the most satisfactory explanation of what the equipments are; and this construction meets what was intended to be provided against by the Legislature. In fact, with respect to transports or store ships, it appears to me that to hold that the equipments must, upon the face of them, reveal their intention, would almost be to repeal the Act,—you could not do it.

*Lord Chief Baron.*—It is a little contrary to the general spirit of our criminal law to suppose that the most guilty intention will render an act a crime which is otherwise innocent. For instance, if you administer something which is not calculated to kill, however strongly you may believe it will have that influence in consequence of some magical ceremony which it has undergone, that is not a crime. It is not even a misdemeanor to administer, for instance, pills that have been exposed to the light of the moon at Candlemas, or gone through any other absurd ceremony for the purpose of producing what the party who administers them believes to be a poisonous effect. The administering of those pills would not even be a misdemeanor of any kind.

*Mr. Solicitor General.*—In those cases the things could not produce the effect, but here is a ship calculated to carry out the object, although it may be fitted also for other things.

*Lord Chief Baron.*—You see, I am merely calling your attention to that portion of our criminal law, which certainly lays down this, that the most guilty intention will not render an innocent act a crime. It may be very wicked, but it is not a crime. It may be said, you know, that a man who administers something which he thinks will kill, is as much guilty of an intention to murder as a man who administers prussic acid, or arsenic, or aconite.

*Mr. Baron Bramwell.*—I suppose you would contend that supposing an Act of Parliament had made it criminal for any person to administer to any other person anything with intent to commit murder, then if a man gave the harmless pills that would be within the Act of Parliament, and that the argument on the other side is pretty much the same as the argument would be there, if it were said, how could this be done with the intent, when it could by no possibility bring about the result.

*Mr. Attorney General.*—If a man keeps house with the intent of defrauding his creditors, although keeping house is quite



innocent in itself, yet the intent and the act together are made a crime by the law.

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—I was going to refer to the case that Mr. Baron Bramwell put, of a man being in the neighbourhood of a house for the purpose of watching and so on, then the act is made guilty by the intention; the act itself is innocent, but the intention makes it guilty.

*Lord Chief Baron.*—There the act is of a doubtful character; the keeping house with the intent of defrauding one's creditors is not innocent; it is an act of bankruptcy; you must take it altogether, but we have long ago come to consider an act of bankruptcy not a crime, and bankruptcy itself only a misfortune.

*Mr. Solicitor General.*—Certainly, my Lord, but I was taking the case Mr. Baron Bramwell suggested of a man watching outside a house with the intent to steal; then an otherwise innocent act becomes guilty by the intention, and you look at the intention to interpret the act. So here the Act says you shall not do two things; you shall not equip and you shall not equip with such an intention. So that if you show the equipment and show the intention, you show the two things which the Act requires, and that is the simple construction which we put upon the Act. And if you import into the Act that the equipment must be upon the face of it such as would necessarily indicate the intention, you add provisions to the Act which are not to be found in it.

Now, my Lords, having said so much with respect to the construction of the Act, I hope I have at least succeeded in making my view intelligible to your Lordships, namely, that any equipment with the prohibited intention is enough. I now come to the evidence in this case, and I think it may be convenient to say a word or two about that before I proceed to the summing up. You have had the evidence very minutely brought before you by my learned friend the Attorney General on one or two occasions, but I will state generally now what it was. I am ready to deal with either question, the summing up or the evidence, whichever might be convenient, first. I propose to say a word about the verdict being against the evidence before I proceed to the summing up. I am quite willing to take any other course if the Court thinks it convenient.

*Lord Chief Baron.*—Pray pursue your own course.

*Mr. Baron Bramwell.*—What appeared to me was, that as to the substance of my Lord's summing up, we cannot possibly have a better authority than himself; and that the purport of his summing up was that the equipment did not come within the class of acts contemplated by the statute. He said that the act must be,—I do not say an arming,—on the contrary, he said it need not be an arming, but of a warlike character,—something calculated to enable the ship to commit hostilities. I think that is so. That is the direction you find fault with, you know.

*Mr. Solicitor General.*—Yes, my Lord, I was going to say a few more words about the direction. I was going to contend

ARGUMENT.  
 5th Day.

that the effect of some parts of the direction might be, though not open to direct exception, calculated to confuse the jury, and that the Court might think it desirable to have a new trial, even if there was not an absolute misdirection. I was going to say a word upon that, after touching upon the evidence.

*Lord Chief Baron.*—That might be considered rather hard upon the defendants, and the rather as the Attorney General, on the part of the Crown, certainly did not put forward any distinct proposition of law at the trial, and, therefore, if the complaint of want of proper direction and of full explanation arises on the part of the Crown itself, I think it would be rather too much to say that the defendants are to be put in peril a second time on that ground.

*Mr. Solicitor General.*—With great respect, my Lord, I cannot accede to your Lordship's statement that no proposition of law was distinctly laid down by the late learned Attorney General.

*Lord Chief Baron.*—I supposed you had not forgotten what I said upon that subject; I thought it right to refer to it, and say so, because I have again looked over the whole of the proceedings on the trial, and I can find no instance of any distinct and clear proposition of law beyond this, that in the circumstances of the present case the Crown is entitled to the verdict, and that the jury ought to find that the vessel is forfeited.

*Mr. Solicitor General.*—I think, my Lord, I can refer to one or two propositions of law very clearly stated by the late learned Attorney General. I begin with one in page 226.

*Lord Chief Baron.*—Is that in the large edition?

*Mr. Solicitor General.*—It is, my Lord.

*Lord Chief Baron.*—That is the very last page of everything that the Attorney General said.

*Mr. Solicitor General.*—That is so, my Lord.

*Lord Chief Baron.*—I should have expected that if it was meant to assist the Judge and the jury, it would have been the earliest thing, not the last.

*Mr. Baron Bramwell.*—What is the proposition laid down there?

*Mr. Solicitor General.*—It is this, my Lords, "I ask you to give your conclusion in this case on the evidence; and I will state at once what I intended to have stated a little earlier, that, so far, I agree with my learned friend, that the 'intent' must be an intent of one or more, having at the time the means and opportunity of forwarding and furthering such intent by acts. I agree that anything else called an intent, or that which would be called an intent in the mind of any person not of this description, must be treated properly as a mere wish, imagination, or desire. By 'intent,' undoubtedly the Act means practical intent. But here you have various persons apparently with the power of influencing the destination of this ship." That appears to me, my Lord, to be very clearly stated,

*Lord Chief Baron.*—That is not what I complain of; if "intent"

were the only word used in the Act, it would be very well to say that there he explains intent. But what I complain of is, that there is no distinct proposition of law which says this Act is directed against so and so; if, therefore, the vessel is found under such and such circumstances with such an intent, then the verdict ought to be for the Crown and against the defendant. No doubt there are scraps here and there, such as that explaining the word "intent" here, for instance; but there is no proposition of law distinctly laid down. I cannot do better than call your attention for a moment to the exception; I happen now to have it before me, I had not got it on the former occasion. These are the exceptions, and you will see from them the view which the late learned Attorney General took of my summing up. I am going to read to you the expanded exceptions which were sent to me a fortnight or three weeks after the trial.

ARGUMENT.

5th Day.

*Mr. Solicitor General.*—I believe, my Lord, that is not in the book.

*Lord Chief Baron.*—No; I will tell you what they were. First, "That if the vessel was in course of building, in execution of a contract with or order from the Confederate States, or their agents at Liverpool, for the purpose of being employed by the Confederate States to commit hostilities against the United States, the statute was not violated." There is no pretence for saying that I ever laid that down. I am sure that none of my learned brothers can imagine that I ever laid that down in any part of my summing up. The second is this:—That, "if the vessel was not intended to be equipped, furnished, or fitted with a warlike armament within the realm, the statute was not violated." I have never used the words "warlike armament" at all.

*Mr. Solicitor General.*—Not exactly that expression, my Lord.

*Lord Chief Baron.*—I say that there is nothing in the summing up that will warrant that. Then it says, thirdly, "That it is immaterial that the persons engaged in executing such contract or order knew that the vessel was to be employed by the Confederate States against the United States." I took that matter for granted; but I never said it was wholly immaterial. Lastly, That "in the seventh section of the Act, the words equip, furnish, fit out, and arm, all mean the same thing." My summing up does not contain that. On the contrary, I referred to the case in the 6th Peter's, where I told the jury that the American jury found that the vessel was fitted out, though she was not armed, and that I approved of that, and left that as one of the matters that I summed up to them. And if this had been even hinted at, for at the trial this was not even hinted at in the remotest degree; I have the original paper handed to me at the time of the trial, which contains nothing about that exception, and that induced me to believe that the Attorney General agreed with me, that, substantially the four words did mean the same thing; I say, if that had been mentioned

ARGUMENT.

5th Day.

at the time of the trial, before the jury were dismissed, I should have said at once and instantly, Gentlemen of the jury, I expressed my opinion upon the meaning of these words, as I think I was justified in doing; but I never meant to lay it down as a matter of law; on the contrary, I left the case to you in a manner that excluded my so laying it down.

*Mr. Solicitor General.*—On the subject of the meaning of “equipment,” and so on, the late learned Attorney General directly joined issue with your Lordship; and when your Lordship said that you thought that equipping, furnishing, fitting out, and arming meant the same thing, he said, “No they did not.”

*Lord Chief Baron.*—At what page is that?

*Mr. Solicitor General.*—I think your Lordships will find that, substantially, that is so. I had not the advantage of being present at the trial. I am referring to the notes; it is at page 199 of the larger book. You will see the learned Attorney General draws attention to the fact that the words “equipped,” “furnished,” “fitted out,” and “armed,” are used not conjunctively but alternately, as it is called here. It begins at the very top of page 199. “The next contention of my learned friend” was this, that to bring the case within the statute the vessel “described in the 7th section must be a fully armed vessel” issuing out of a port. Now, I cannot, of course agree to that argument, or adopt that view of the section of the statute, “because it is upon the surface of the statement in the first sentence which I addressed to the jury that this was not an armed vessel. The whole history of the matter is now before the jury. Of course, there was never any idea of suggesting that the vessel was armed. I will come hereafter to the arms that were probably intended to be put on board her by and bye; but at the time of the seizure the vessel was in the state which I described, built for warlike purposes, and for those only, but not having received any armament on board. Now, addressing myself to this point, I have no doubt your Lordship has observed that those various words (and they are numerous) which are used in the statute, such as ‘equipped,’ ‘furnished,’ ‘fitted out,’ ‘armed,’ and so on, are used not conjunctively but alternately.” That is expressly put to your Lordship. *Lord Chief Baron.*—They are used conjunctively in the preamble and disjunctively in the enacting clauses. *The Attorney General.*—Yes, my Lord, and I shall show your Lordship good authority that the true construction, as I understand it, whatever may be the language of the preamble, is disjunctive. It is used disjunctively.” Now there could not be a more clear statement of a proposition of law than that. I am dealing with your Lordship’s remark that there was not a single clear proposition of law stated.

*Lord Chief Baron.*—I said a clear proposition of law, laying down the rule which was to govern the case. If you think that that is met by pointing out a few words in one address, and

some others in another, dealing with the equipment at the beginning and the intent at the end, and other things in the middle, I do not.

*Mr. Solicitor General.*—I do not mean to say that there was so clear and complete an exposition of the statute as we have heard from the present Attorney General.

*Lord Chief Baron.*—The late Attorney General did not say what “equip” meant, as distinguished from “fit out and arm.”

*Mr. Baron Bramwell.*—The observations of the late Attorney General are very distinct in a sense; they are of a negative character. He says, It is not right to take it like this and I do not agree to this; but you do not find him saying anything positive.

*Mr. Solicitor General.*—He hands up the case in the 6th Peter’s.

*Mr. Baron Pigott.*—I understand my Lord to say that he wanted him to point out, I do or I do not complain of the building the whole hull of the vessel, but something more is done: I do complain of the way in which the bulwarks are fitted: I do complain of the stanchions being there. That is what my Lord says he ought to have laid down fully and clearly.

*Mr. Attorney General.*—I think I have found a passage, if your Lordship will look at it, at the top of page 210.

*Mr. Solicitor General.*—On page 209 the Attorney General discusses the Act at some length; he reads the provisions of the Foreign Enlistment Act, and then he quotes one or two cases. He quotes the United States against Guinet, 2nd Dallas Reports, page 321, to show “That the converting a ship from her original destination with intent to commit hostilities, or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit, for the Act would otherwise become nugatory and inoperative. It is the conversion from her peaceable use to the warlike purpose that constitutes the offence. Then it appears that the vessel to which that case referred never actually proceeded on a cruise, and yet Gwinet was convicted. Whereas he argues, ‘In the case at bar, the ‘Bolivar,’ having actually performed her cruise and made captures of vessels and property of nations with whom the United States were at peace, no room is left for doubting the object of her outfit in the port of Baltimore.’ But of course it was necessary that the act should be completed within the territories of the United States. And it was, therefore, held that under that portion of the statute in which the word ‘or,’ and not the word ‘and,’ is used, and in that respect exactly the same as the general structure of our seventh section, upon the charge of being concerned—which is one of the charges in this information; in the fitting out, such charge is established by showing the intent, and a partial construction only, and not a complete construction or

ARGUMENT.

5th Day.

ARGUMENT.  
5th Day.

"arming of the vessel. That applies to one of the objections taken by my learned friend Sir Hugh Cairns in this case, that the vessel is not a complete vessel, and to his argument, that in order that it should be brought within any one of the limits of this section it ought to be a completed vessel. To which, as I understand his argument, there should be superadded some equipment or fitting or arming, which he contended besides was indispensable to make the offence in any sense a complete offence. Gentlemen, I think I have now come to the last of the legal discussions invited and raised by my learned friend, and upon this authority I would submit to you, that the authority also agrees with the reasonable construction. Two points are established; first that arming is not necessary in order to constitute one of the violations of the statute, namely, the being concerned in, or probably endeavouring, but at all events being concerned in the equipping, furnishing, or fitting out."

*Mr. Baron Bramwell.*—That is a negative.

*Mr. Solicitor General.*—"And the next, that it is not in any view of the section necessary that the vessel with reference to which the forfeiture is sought to be affirmed should at the time of seizure be a completed vessel, and have then superadded some armament or fitting of war."

*Mr. Baron Bramwell.*—I noticed that passage before. You see there are two negatives stated there, but nowhere the proposition which we have heard from the learned Attorney General in the course of this argument, which says that any equipping will do, however innocent in character, if it were done with the intent.

*Mr. Solicitor General.*—The Attorney General proceeds to state the evidence, and what is affirmative in his speech is, I think, to be found in his comments upon the evidence.

*The Court adjourned for a short time.*

*Mr. Solicitor General.*—My Lords, upon the subject to which your Lordship referred, I may perhaps mention that I find that the late Attorney General called the attention of his Lordship very pointedly to the case of "*The United States v. Quincy*," and the passages at page 204 of the report which I have here of the Attorney General's speech——

*Lord Chief Baron.*—What is the object of what you are referring to? Is it to point out some proposition of law distinctly laid down?

*Mr. Solicitor General.*—Yes, my Lord.

*Lord Chief Baron.*—Really I think we have had almost enough upon that subject.

*Mr. Solicitor General.*—Very well, my Lord, I should not have referred to it if your Lordship had not done so. I did not propose to trouble the Court with any portions of the late Attorney General's statement; but, as your Lordship stated that there were

no distinct propositions of law laid down by him, I was going to say that I think I could mention some.

*Lord Chief Baron.*—It is an exceedingly painful matter to allude to the late Attorney General in this way.

*Mr. Solicitor General.*—No doubt it is, my Lord.

*Lord Chief Baron.*—It is impossible not to feel the condition in which the late learned Attorney General is now placed, and it is impossible not to entertain a respect for him, as a most honourable and learned, and particularly, I think, an independent minded man, who would always endeavour to do his duty. But, at the same time, if one is called upon to remark as to the mode in which the matter was presented to the Court and to the jury, one may say that one should have expected an explanation about the statute to come in the first instance from him; one might have expected him to say, Here is the law; it has never been put in force before. He did tell the jury that; he said, I shall prove these facts. He did not say in what manner those facts would apply to that statute, nor did he give anything like an explanation of it which could enlighten the minds of the jury or enlighten the Court. I do not profess to say that I or any Judge would at once pretend to expound with perfect certainty an Act of Parliament to which our attention was then for the first time called, and which had slept in the statute book for 44 years.

*Mr. Baron Bramwell.*—And which has required five days for its perfect elucidation.

*Lord Chief Baron.*—And which has been the subject now of five days' argument. I say, I should have expected that in the outset we should have been told what the Crown complained of as distinctly as this; The proposition which we propose to derive from the Act is in point of law so and so. But not only did I not get that, but I did not even get any assistance; and when I proposed to go into it and see whether we could not, by paring down the proposition first on one side and then on the other, get to some point, I had not only no assistance but I had a steady refusal to answer any question, or to give me any information beyond this, We are entitled to the verdict.

*Mr. Solicitor General.*—This is, my Lord, as you have said, a painful subject which I did not intend to discuss if it had not been referred to by your Lordship. No doubt there was not the complete and full explanation of the statute which we have heard from the present Attorney General. At the same time I only ventured, and I will not say more about it, in answer to a remark from your Lordship, to show that in many passages of his address the late learned Attorney General had expressed some very plain propositions of law. But indeed I will not dwell upon the subject. I was not at the trial and therefore I am the less able to judge of the manner in which the case went to the jury.

As your Lordship has referred to this matter, it may be convenient, as connected with it, that I should refer at once to the

ARGUMENT.

5th Day.

ARGUMENT.

5th Day.

summing up, and I will proceed to do so. I was about to say a little while ago, with respect to the summing up, that we have, I think, one very clear and definite matter about which there is no mistake. It was ruled, and that ruling has been supported by my learned friends here, that the equipment must be of a warlike character, and I wish that there should be no misunderstanding about that;—not of a warlike character as explained by intention, but of a warlike character to some extent *per se*, and on the face of it. I wish to have that clearly understood, because if it is to be contended that any equipment *incipit* *usus* is to be shown to be of a warlike character solely by intention, that would be another case altogether. That is what we contend for, as I have before observed. But it is contended, and that really is the main question, that the equipment must be, to of a certain extent, *per se* of a warlike character. It is not enough that it shall be shown that the equipment was applicable to warlike purposes; it is not enough to show that the equipment was suitable, but the equipment must be shown to be peculiarly suitable; and must be made to appear to be so on the face of it. I have already said as much as I need say upon that subject, and I will not repeat my remarks. If my learned friend, the Attorney General, and myself are right upon this point in our view of the law, then there was a misdirection; about that there can be no question. I do not desire to subject the ruling of my Lord to any minute or verbal criticism, and I shall, of course, gladly accept in a moment any explanation from the Lord Chief Baron with regard to the meaning of his words. At the same time I think it my duty to call attention to this summing up, which I cannot help thinking had the effect of not directing the attention of the jury to the true construction of the statute, and may have tended to produce an improper verdict.

Now, my Lords, I apprehend that upon the construction of a statute of this importance it would be the duty of a Judge to give the jury some direction, and that the mere leaving of the words of the statute to the jury without any direction would be extremely unsatisfactory. My Lords, there is a case bearing upon this matter, namely, "*Elliot v. the South Devon Railway Company*," reported in the second volume of the Exchequer Reports at page 725, and in that case, which was tried before Mr. Justice Wightman, the Court directed a new trial upon the ground that the Judge did not explain to the jury the meaning of a term used in the Act of Parliament, but left it for them to put their own construction upon it.

*Lord Chief Baron.*—What was the word?

*Mr. Solicitor General.*—The word was "town," which is a phrase, I should think, likely to be as well understood by a jury as "the equipping of a vessel." The case is fairly stated in the marginal note. "It was the trial of an issue whether a railway " was passing through a 'town,' within the meaning of the Railways Clauses Consolidation Act (8 & 9 Vict. chap. 20, sect. 11).



"The judge merely told the jury that the word 'town' was to be understood in its ordinary and popular sense. Held, a misdirection, inasmuch as the judge ought to have given such a definition of the word 'town' as would have enabled the jury to decide the issue. 'Town' in that Act means a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses."

ARGUMENT.

5th Day.

*Mr. Baron Bramwell.*—Why did not somebody say, that there was no explanation given of what a "collection" meant, and what a "house" meant, and what "continuous" meant, and so on; they are all English words.

*Mr. Solicitor General.*—This was a decision of this Court, the Court of Exchequer.

*Mr. Baron Bramwell.*—I am aware of that, and, if I may venture to say so, it is not entitled to any more respect on that account; still, of course, it is entitled to all respect; but I have often thought, what is a Judge to do in such a case? Here is a plain popular English word without any peculiar technical signification. You are expected to explain it to the jury. You must explain it by other popular plain English words. Then must you not explain them? So that I do not know where you are to stop.

*Mr. Solicitor General.*—The Court of Exchequer, of which Mr. Baron Parke was a member at that time, held that a new trial must be granted because Mr. Justice Wightman did not explain in what sense the Legislature used the word "town." That was the case: "The learned Judge was certainly not bound (I am reading what Mr. Baron Parke says) to define the meaning of 'town,' so as to embrace every possible case, yet he ought to have given a definition sufficient to enable the jury to decide the present question, which is, whether the railway can be considered as passing through a 'town' within the meaning of the Act of Parliament." That is the substance of the decision of the Court of Exchequer, and a new trial was accordingly granted. Now, if it were necessary or desirable to explain what was meant by "town" in the Act of the 8th and 9th Victoria, I cannot help thinking that it is quite as necessary to explain what was meant by the word "equipment" in the Foreign Enlistment Act, which is at least as important a statute, and at least as ambiguous. I have only to say upon that point, that according to the decision of this Court, if the learned Lord Chief Baron had merely left to the jury, in the words of this Act, Was there an equipping, and so on, that would not have been considered satisfactory.

But, my Lords, it appears to me that there were certainly expressions independently of the point which I have put, (upon which there would be a clear misdirection if we are right), tending to mislead the jury. It is not at all unnatural, and not at all improbable, considering that the Act had not been con-

ARGUMENT.

5th Day.

strued in this country before, and considering, as your Lordship has observed, the number of days which have been required to elucidate its meaning now,—I say it is not unlikely that the learned Judge might, upon the first trial of the case, not have quite understood its meaning. It is no doubt an Act of peculiar difficulty to construe. It appears to me, my Lords, that the summing up of the learned Judge had a tendency to induce the jury to suppose—this I take not from a minute criticism of a few passages, but from the whole—that the only question for them was the intent of the builder or the equipper. Nothing is hinted in the course of the charge as to the intent of any foreign belligerent, or the agent of any foreign belligerent, and I cannot help thinking that although his Lordship may not have intended to lay down any wrong law upon this point, still that it may have been much misapprehended by the jury. Supposing that it had not been shown that Messrs. Fawcett, Preston, and Company, or Messrs. Miller and Company, intended this vessel for foreign service, supposing there had been no evidence of that at all, still if she was ordered by Captain Bulloch, or any of the Confederate agents for the Confederate service, that was enough to forfeit the vessel. But that view was not presented to the jury at all. When we come to the latter part of the summing up, I think you will see that it would point the attention of the jury only to the intention of the defendant, that is of the equipper. His Lordship says, “Gentlemen, if you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship, in obedience to an order, and in compliance with a contract, leaving it to those who bought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not been in any degree broken.” These words “in compliance with a contract,” and so on, apply to the builder, but the attention of the jury is not directed to this, that independently of the builder the vessel may be forfeited on account of an order given on behalf of a foreign Government.

I think if we go back to a former part of the summing up, it will be more clear that the attention of the jury was not directed to this most important distinction between the fitting out upon speculation or in pursuance of an order, which really is the point of the case, as I have endeavoured to show before; for the Lord Chief Baron says that the Attorney General did not answer the question which he had put to him, which was this, “Do you mean to say that a man cannot make a vessel intending to sell it to either of the belligerent powers that requires to have it?” Then your Lordship says, “You are lawyers enough to answer it yourselves. I think that answer ought to be ‘Yes; a man may make a ‘vessel.’ Nay more, according to the authority I have just read” (that was the ‘Santissima Trinidad,’ to which I have referred) “according to the authority I have just read, he may

" may make a vessel and arm it, and then offer it for sale. So Story lays down." That is true, " But I meant, gentlemen, as I said then, if I had got an affirmative answer to that question, to put another. If any man may build a vessel for the purpose of offering it to either of the belligerent powers who is minded to have it, may he not execute an order for it? Because it seems to me to follow, as a matter of course, if I may make a vessel and then say to the United States, 'I have got a capital vessel, it can easily be turned into a ship of war; of course I have not made it a ship of war at present; will you buy it?' If that is perfectly lawful, surely it is lawful for the United States to say, 'Make us a vessel of such and such description, and when you have made it send it to us.' " I cannot help thinking that this, following immediately after the case of the "Santissima Trinidad," may have led the jury, although the learned Lord Chief Baron did not intend it, to suppose that if in the case of the "Santissima Trinidad," the vessel had been fitted out and armed in pursuance of a contract with the belligerent, instead of being so fitted out merely on speculation with the hope of being sold to him, the decision would have been the same,—whereas it would have been the reverse. I cannot help thinking that the jury would be liable to receive that impression.

ARGUMENT.

5th Day.

*Lord Chief Baron.*—Do you think that where by possibility a jury may have misunderstood the words of a learned Judge, that is a case for a new trial?

*Mr. Solicitor General.*—Not the mere possibility, my Lord, but the probability.

*Lord Chief Baron.*—Who is to judge of that?

*Mr. Solicitor General.*—The Court, of course, my Lord. I made my observations subject to the opinion of the Court.

*Lord Chief Baron.*—All you said amounted to this, that the jury may have so misunderstood it.

*Mr. Solicitor General.*—I should venture to put it to the Court that there was a tendency to mislead the jury in those observations. I cannot help thinking so. Then the Lord Chief Baron refers to the argument of the late Attorney General, a very cogent argument; and it would appear from that that the Attorney General had addressed himself to this view of the question. His Lordship says, "Now the learned counsel certainly addressed themselves very much to this view of the matter. It was said, But if you allow this you repeal the statute." Well, my Lords, that I should argue myself certainly, and that it appears that the then Attorney General did argue. Then the Lord Chief Baron says, "Gentlemen, I think nothing of the kind. What that statute meant to provide for was, I own, I think by no means the protection of the belligerent powers. I do not think their protection entered into the heads of those who framed this statute." That is so far correct. There can be

**ARGUMENT.** no doubt that we did not frame this statute for the immediate purpose of protecting belligerents, but to preserve our own neutrality. "Otherwise they would have said, You shall not sell gunpowder; you shall not sell guns. There are places that now and then explode in different parts of the kingdom, and which would have complained very heartily if they had said, You shall not sell gunpowder; you shall not sell arms. Why, all Birmingham would have been in arms. But the object of this statute was this: we will not have our ports in this country subject to possibly hostile movements; you shall not be fitting up at one dock a vessel equipped and ready, not being completely armed, but ready to go to sea, and at another dock close by be fitting up another vessel, and equipping it in the same way, which might come into hostile communication immediately, possibly before they left the port."

**5th Day.**

*Lord Chief Baron.*—You have been in the habit of referring to the Foreign Enlistment Act. With respect to the first part of it. I may say that I believe there are plenty of instances where, in a neutral state, some of the inhabitants have enlisted on one side in a war and some on the other, and have actually got into personal conflict.

*Mr. Solicitor General.*—I do not know of any case of that kind, my Lord, but it may be so.

*Lord Chief Baron.*—I think you will find, historically, that there are plenty of cases of that sort.

*Mr. Solicitor General.*—It may be so, my Lord, but I apprehend that that would be an offence against the common law.

*Lord Chief Baron.*—However ridiculous, trumpery, or contemptible an illustration may be, that has nothing to do with the construction of the Act. If the Act was intended to prevent the neutral ports from being the starting points of hostile movement, whether there was a subordinate motive, that there should not be the North and the South contending in our own ports, is quite unimportant. It does not abate in the slightest degree from the argument, though it may be very absurd to quote that as an example; at the same time I own I do not think it was quite so absurd as the learned Attorney General seemed to think.

*Mr. Solicitor General.*—I am sure, my Lord, I was far from taking this as more than an illustration. I know it was only an illustration, and your Lordship was far from saying that that was the only mischief intended to be met by it.

*Lord Chief Baron.*—That is an illustration of one of the mischiefs which might by possibility occur.

*Mr. Solicitor General.*—At the same time I cannot help thinking that it led to this view of the object of the Act, "We will not have our ports subject to possibly hostile movements." But I contend that that was very much narrowing the construction of the Act; that it was not passed to prevent any inconvenience which we might suffer from hostile movements in our ports.

*Lord Chief Baron.*—No, not hostile movements *in* our ports, hostile movement *from* our ports. ARGUMENT.

*Mr. Solicitor General.*—In my copy, my Lord, these are the words, "We will not have our ports in this country subject to "possibly hostile movements," and then the kind of hostile movement is indicated by what follows, which shows that it was within the port.

*Lord Chief Baron.*—No, no; really this is more like a critical reviewer going through the summing up, than anything else.

*Mr. Solicitor General.*—I do not really wish, my Lord, to subject your Lordship's summing up to any verbal criticism.

*Lord Chief Baron.*—*Mr. Solicitor General*, I may appeal to you, whether you have ever heard, since you have been a member of the profession, a short-hand writer's note of a summing up treated in the manner in which this has been treated for three or four days.

*Mr. Baron Bramwell.*—This note is like an unpleasant portrait in which every little scratch on your face may be seen.

*Lord Chief Baron.*—And even the unsaven corner of your chin.

*Mr. Solicitor General.*—It was first referred to, my Lord, by my learned friends on the other side,—they made the first use of it.

*Lord Chief Baron.*—But I believe not in disparagement of it.

*Mr. Solicitor General.*—No, my Lord.

*Mr. Baron Bramwell.*—I have often thought of the comparison between the two arts of photography and short-hand writing; both arts are wonderfully clever, but it would require the most perfect countenance, and a wonderful command of language, if the one or the other did not sometimes represent you as having done or said or looked something that you would rather not be thought to have done or said or looked.

*Mr. Solicitor General.*—No doubt, my Lord, and although the sun is occasionally unpleasingly accurate, still he is always accurate in one sense; but we know that the short-hand writer is liable to mistakes, and he makes them sometimes.

*Lord Chief Baron.*—As I am the president of the Photographical Society, I am obliged to you for that distinction. Photography does not make mistakes; short-hand writers do.

*Mr. Solicitor General.*—Photography gives an unpleasant version, but not an absolutely untruthful one; yet it is unquestionable that in one sense it does misrepresent a man, for though literally rendering some things, it omits others; for example, colour; thus often conveying a false impression; but the short-hand writer sometimes writes down what is not said, and sometimes leaves out what is said, his performance therefore scarcely resembles a photograph.

Now, my Lords, I will pass from this subject; as your Lordship tells me that that is not the meaning of the passage I will say no more upon it. I will only observe further that I cannot help thinking that the jury very possibly may have been under the same impression, which unquestionably was entertained both by

5th Day.

ARGUMENT.  
5th Day.

the present and by the late Attorney General, as to what your Lordship said upon the subject of furnishing, equipping, fitting out, and arming all meaning the same thing, because I venture to remind your Lordships of this, that in the course of the speech in reply of the late Attorney General the Lord Chief Baron referred to Webster to confirm his view, and then the Attorney General said, "That is not so," and handed up the case in Peters; then there followed a discussion.

*Lord Chief Baron.*—Not quite so. There is no doubt that if you mean to say that I referred to Webster and he handed me up the case in Peters, it was so, but it was not thereupon.

*Mr. Solicitor General.*—Not immediately, my Lord.

*Lord Chief Baron.*—Nothing like it. He expressed no dissent whatever, but he did quote a case which was inconsistent with that, upon which I immediately adopted the case he cited.

*Mr. Solicitor General.*—I was going to observe, my Lord, upon that. I must be forgiven for saying a word upon it. The Attorney General handed up the case in the 6th Peters in the course of his address.

*Lord Chief Baron.*—He did not hand it up.

*Mr. Solicitor General.*—I think he handed it up to your Lordship.

*Lord Chief Baron.*—No, you will find what passed stated at full length; that is a mistake, he did not hand it up to me.

*Mr. Baron Bramwell.*—I am sure that if it were of the least use, I would not ask you not to address this argument to us; but let me put this to you, have you not got enough for your purpose when it is agreed that if your construction of the statute is right, my Lord, to put it in plain language, was wrong.

*Lord Chief Baron.*—Yes, and that is so; if you have got that what more do you want?

*Mr. Solicitor General.*—I was only going to say in addition to that, my Lords,—

*Mr. Baron Bramwell.*—There are two things, the fitting out and the intent, You see here you have only one of two things to establish,—establish your proposition, and then you will be right, because it would be then evident that the direction was opposed to your view.

*Mr. Solicitor General.*—We believe ourselves to be right, but of course we are not infallible, and we may be wrong, and it is only upon that assumption that what I am now submitting would be relevant.

*Mr. Baron Bramwell.*—That is so; it may be that you are wrong in your construction of the statute, and that a warlike equipment is required.

*Mr. Solicitor General.*—But not an arming, and the jury may have understood that an arming was necessary.

*Mr. Baron Pigott.*—Then you go further and say, Still there may have been an endeavour or an attempt to arm, do you not?

*Mr. Baron Bramwell.*—That is another point; that would be a verdict against evidence upon that supposition.

*Mr. Solicitor General.*—There is no count for endeavouring to arm; arm is not mentioned at all.

*Mr. Baron Pigott.*—Endeavour to equip will answer the same purpose.

*Mr. Solicitor General.*—I was going to say that what was understood by both the Attorney General and the Solicitor General, and by the counsel for the Crown, may have been understood by the jury, and I think your Lordships will see that it is not improbable that that may have been so, because after the Lord Chief Baron had expressed an opinion that equipping and arming meant the same thing, the Attorney General cited the case of “the United States against Quincy,” and it was after that case had been cited that his Lordship stated that still his opinion was —

*Lord Chief Baron.*—What I stated, I stated as my opinion, but I told the jury expressly that I did not lay it down as law. You can take the conclusion from what I stated to them, namely, that though it was quite right to find that the vessel was not all armed, yet if she was fitted, the verdict was to be for the Crown.

*Mr. Solicitor General.*—If your Lordship told the jury expressly —

*Lord Chief Baron.*—I did tell them expressly that if they should find that the ship was fitted, though she was not armed, the verdict must be for the Crown.

*Mr. Baron Bramwell.*—I think, Mr. Solicitor General, it is too clear to admit of a doubt that it was so.

*Mr. Solicitor General.*—Very well, my Lord, it appeared to me that the jury were under the same impression that my learned friends were under, but if your Lordship says that that was not so I will pass on at once.

*Lord Chief Baron.*—As Mr. Fox said once of a speech, A speech is a thing to be spoken not to be read, and it may in delivery be very good and perfectly fit for the purpose, and yet it may read very badly. Every speaker addresses himself to his audience, watching the effect which he has produced upon them, and so in summing up to the jury you see whether the jury understand you or not, and go along with you. If they do, you do not go on as if you were special pleading or drawing an indictment. You see that the jury understand what you mean and you do not say that which shall be *omni exceptione major*, when it comes to be put into writing and criticised as if it were a composition framed with some aim in view. You see whether the jury understand what you are about, and if you think you have made them understand it, taking it for granted that they are not taking an inattentive view of the subject, you pass on the moment that you imagine that you have got them to understand what you mean.

*Mr. Solicitor General.*—That is exactly the test which I wish

ARGUMENT.  
5th Day.

to apply to the summing up. I do not wish to make any verbal criticism.

*Mr. Baron Bramwell.*—How could the jury misunderstand this, “Armed she certainly was not, but was there an intention “that she should be furnished”?

*Mr. Solicitor General.*—You see, my Lord, that if the Judge tells the jury, as his Lordship did two or three times, that “equipping” and “arming” mean the same thing, and then that they may have some different signification, without explaining what, the jury do not know what the Judge means.

*Lord Chief Baron.*—They would know perfectly if they had the least sense in the world. Unless they have an intention to misunderstand it, I do not see how they could doubt about it.

*Mr. Solicitor General.*—Certainly, my Lord, there was no intention to misunderstand your Lordship on the part either of the late or of the present Attorney General, yet they did misunderstand it.

*Mr. Baron Bramwell.*—No; not quite so, I understand that what the late Attorney General and the present Attorney General understood was this, that my Lord had said that the equipping, furnishing, and fitting out, must be of a warlike character, and therefore in a certain sense must be in the nature of an armament.

*Mr. Attorney General.*—That is what we thought, my Lord.

*Mr. Baron Bramwell.*—Exactly; my Lord says now, that he did say so, but the learned Solicitor General is trying to make it out that there was a misdirection beyond that, to the extent of saying that there could be no fitting out, furnishing, or equipping unless the vessel was armed.

*Mr. Solicitor General.*—I will pass from that, my Lords. The then Solicitor General seems to have understood it so at the trial, for he says, Your Lordship has already said that equipping and arming are the same thing.

*Lord Chief Baron.*—I have already said what it was that the Attorney General complained of at the trial, and he did not object at the trial to the supposed meaning of those words being the same; it was an afterthought.

*Mr. Solicitor General.*—Of course, my Lord, if your Lordship tells me so I must so take it.

*Lord Chief Baron.*—There is no doubt about it. I have read the objection made at the trial, and I have read the objection made three months afterwards. If that had been made at the trial I would have corrected it almost in a syllable. I stated my opinion; I did not mean to lay it down as the law.

*Mr. Attorney General.*—Perhaps your Lordships will permit me to say, with regard to that, that what your Lordship says is perfectly accurate. What was tendered at the trial with regard to warlike armament was meant to express the sense in which we understood your Lordship to explain the words, and then when we found that your Lordship had not used the expression it was



thought well to add some other words which your Lordship was considered to have used.

*Lord Chief Baron.*—If the statement of all the words meaning the same thing had been dissented from in the way it appears now to have been done, I am surprised that it was not made the ground of an objection at the trial.

*Mr. Attorney General.*—We thought it was expressed in the word “armament,” my Lord.

*Mr. Solicitor General.*—Not having been at the trial, it is not for me to say anything further upon the matter.

*Lord Chief Baron.*—That was why I would not sign the bill of exceptions, because they put in the expression “warlike armament,” which I did not mean to use at all.

*Mr. Solicitor General.*—They understood your Lordship to have meant it; they certainly so understood it.

*Lord Chief Baron.*—What I said to the late Attorney General was this, “Put your objection in the language that occurred at the trial, and do not put into my mouth language which I never used.”

*Mr. Solicitor General.*—I am sure that your Lordship will agree with me that whatever the late Attorney General imputed to your Lordship was what he understood.

*Lord Chief Baron.*—Most certainly.

*Mr. Solicitor General.*—But I accept your Lordship’s statement.

*Lord Chief Baron.*—I am sure that I wish to express myself with the highest respect, and the most perfect confidence in his honourable independence of character and integrity.

*Mr. Solicitor General.*—Upon that point I accept your Lordship’s statement that you were misunderstood by the late Attorney General and by my learned colleague, who is now present, and I will pass from that subject. I have submitted that the equipping of a vessel upon a mere commercial speculation, as distinguished from doing it under an order, does not appear to me to have been distinguished in this summing up, which would be an additional objection to it, but having made that observation, I will pass on. I have just one word more to say before I leave this subject. Assuming for a moment it to be the correct view of the statute that there must be an equipment of a warlike character in the sense which has been explained, still I apprehend that there was evidence for the jury of such an equipment, and that being so, it should have been put to the jury to say whether that equipment was or was not of a warlike character. I mean independently of any intention to further equip,—there was evidence of there being an equipment of a warlike character in this case, and that question was not submitted to the jury, but should have been.

Now my Lords, with respect to the evidence, I do not know whether the Court require to be satisfied that a new trial can be

ARGUMENT.  
5th Day.

granted upon the ground of the verdict being against evidence in this case.

*Lord Chief Baron.*—I think that the rule is very clearly established that where the question of supposed miscarriage turns entirely upon matter of fact, there cannot be a new trial in an information involving a forfeiture, a *qui tam* action, and a *fortiori* a mere common indictment. But if the Judge has misdirected the jury in point of law, then there may be a new trial. So also if the Court can be satisfied from the circumstances before them, that the jury must have returned their verdict not under a misapprehension of fact, but under a complete misapprehension of law, then there may be a new trial. That I take to be the rule as established by the authorities, comparing those which were presented to us by Mr. Mellish and by the Attorney General in reply.

*Mr. Solicitor General.*—My Lord, I quite subscribe to the accuracy of that statement with respect to informations *in personam*; but I am inclined to think (and I have some authority for so doing) that with respect to informations *in rem*, the rule is not so curtailed; and there may be some reason for a difference, inasmuch as informations *in personam* are in the nature of criminal or penal proceedings, but in this case it is merely a dispute as to property. The Crown says, "This vessel is mine."

*Lord Chief Baron.*—Do not leave out that the Crown says, "This is mine because somebody has committed a crime, the consequence of which is that this vessel is forfeited."

*Mr. Solicitor General.*—That is so, no doubt, my Lord. I ought to have qualified my statement in that way: "This is mine because somebody has committed a misdemeanor." Then anybody may come in—not necessarily the person who is charged with the misdemeanor, but anybody whose attorney will swear that he believes him to be the owner, nothing more—and he may fight with the Crown, I was going to say, over the dead body of this vessel: he may contest with the Crown the right to this vessel. Now that is in many respects, as it appears to me, a different proceeding from an information *in personam*, and accordingly I find it laid down with respect to informations *in rem*, all the other cases being really informations *in personam*, that the rule generally is that a new trial may be granted without limitation. That is said in Manning's Exchequer Practice, under the head of "information *in rem*—new trial." "A new trial will be granted where the justice of the case requires it, although the verdict be for the defendant." That is laid down generally; it is in the first volume of Manning's Exchequer Practice, page 180, and Manning refers to a case in Bunbury, page 253.

*Lord Chief Baron.*—Bunbury, I think, is a reporter of the slightest authority.

*Mr. Solicitor General.*—He is not a reporter of high authority,

no doubt ; but this case was quoted by Mr. Mellish, and the only observation which I have to make upon it is, that although it is stated to be a *qui tam* proceeding, Robinson against Lequesne, still upon examination it turns out to be an information *in rem*, and not *in personam*.

ARGUMENT.

5th Day.

*Lord Chief Baron.*—That confirms the general opinion as to the slender authority of Bunbury.

*Mr. Solicitor General.*—Not quite so, because I rather think that in the statute of Charles, upon which that proceeding is founded, the informer is entitled to a portion of the property seized. This was an “information of seizure;” it is called “of “Jesuit’s bark, on the statute 14th of Charles the Second, “chapter 11, section 12.” I have looked at that section, and I find that it prescribes no penalties, but only that under certain circumstances goods shall be seized and forfeited. So that this was an information *in rem*, and the report says generally, “There was a verdict for the defendant, and now a “motion was made for a new trial; but *per totam curiam* it “was denied.” Then it is said, “*Nota.*—It seemed to be admitted, in a case of this nature, a new trial might be granted if “the facts would have admitted of it,” and so on. That really is the whole amount of authority which I thought it necessary to bring before your Lordships. I find it stated generally in Manning’s Exchequer Practice (and this case is referred to), that in the case of an information *in rem* a new trial will be granted where the verdict is against evidence. But in respect of informations *in personam* the rule has been qualified, as the Lord Chief Baron has very accurately laid down. My Lords, I do not know that your Lordships would be inclined to narrow the power of the Court to do what they think justice. I should be disposed to think that the Court would not necessarily consider themselves bound to apply a rule which relates to an information *in personam* to another proceeding, which to some extent, at all events, differs from it. That is all I have to say upon that point.

My Lords, I now come to the evidence. I submit to your Lordships that if we are right in our construction of the statute, the verdict is manifestly against evidence. But even if we are wrong, and if there must be not indeed an “arming” but an “equipment” of a warlike character, still I submit to your Lordships, and with some confidence, that there was evidence which, if unanswered, made a verdict for the Crown right and proper, so that any other verdict would be unsatisfactory. Now, let me call your Lordships’ attention to what the evidence with respect to this vessel was as to her equipment. I will summarise it. I will not go through all the detail which has been gone through before. In the first place, it was shown that she was built as a gun-boat; that was shown by an admission from one of the parties concerned; that she was built as a gun-boat, and for the Confederate States. Then it appeared that a good deal of her build and of her equipment was, as it seems to

ARGUMENT.

5th Day.

me, of a warlike character, in the sense for which my learned friends have contended. She was built so that she could not carry any cargo; she was built so that she could carry a large crew; and she was furnished, to some extent, for the purpose of carrying a large crew, which could not by any possibility be a mercantile crew. Although she was a small boat and could carry no cargo, there was a cooking apparatus, among other things, for 150 or 200 men. Then, further, her decks were made of pitched pine, which, according to the evidence of one of the witnesses, Black, is not used for the decks of merchant vessels.

*Mr. Baron Pigott.*—Was the cooking apparatus in the vessel?

*Mr. Solicitor General.*—It was in the vessel, as I understand. I shall be corrected if I am wrong.

*Mr. Baron Pigott.*—Whose is the evidence of that?

*Mr. Solicitor General.*—I can refer your Lordship to it.

*Mr. Baron Bramwell.*—It is at page 103.

*Mr. Solicitor General.*—I have it my Lord. "Let me ask you, did you observe a cooking apparatus?—Yes, there was a cooking apparatus in the forecastle, sufficient for 150 or 200 people. Was that the kind of cooking apparatus which is usual on board merchant vessels?—Only on board of passenger vessels; merchant vessels which are passenger vessels have as large and larger cooking apparatus, or ships which go on long voyages have as large. But a common merchantman would not have so large an apparatus?—No, not a small vessel like that." If she was a passenger vessel, considering the intention, about which there is no doubt, she must have been intended, for a transport, because she was built for the Confederate States, according to their own admissions.

Then the decks are of pitched pine. Now, I observe that in page 62, Black is asked this question:—"What are the upper decks made of?—Pitched pine. Have you ever seen pitched pine used for the decks of any vessel except vessels of war?—No." Then according to the evidence of that witness there is a description of deck which is used only in vessels of war.

Then, my Lords, it is shown that there is a scuttle or hatchway so small as to be totally unfit for merchandise or for the stowing or the unstowing of merchandise, but just large enough for a man to go up and down. Then there is accommodation for a large number of seamen. Then there are bulwarks unusually thick and unusually low. My learned friend on cross-examination asked one of the witnesses, Mr. Green, whether these bulwarks might not be constructed for strength; he said, No, that they would only weaken the vessel. Their weight would, if she were intended for any other purposes but war, be a disadvantage, but those bulwarks were applicable to the resistance of shot, and it was not suggested that they were applicable to any other possible purpose. Then they were made low. Why? In order that a pivot gun might work over them. At all events, that was for the jury. There was not distinct evidence of their

being made low only for that purpose, but that at all events was a question for the jury, whether they were not made low for that purpose. But at all events for their thickness no reason could possibly be suggested except the resisting shot.

Then the rudder was larger and stronger than would be used in any merchant vessel. Then the forecastle was not fitted as a merchant vessel's forecastle;—that is stated in the evidence of Mr. Green. Your Lordships will find that distinctly; it is at page 103, "Did you observe the forecastle?—I observed that it was not fitted as a merchant's forecastle, but as I have seen "yachts and small vessels of war."

Then there are stanchions for hammocks and hammock nettings, as I understand it (I shall be corrected if I am wrong), to be affixed to the bulwarks inside. Why? For the purpose of stopping shot. I do not think that any human being can doubt that that was the object.

*Mr. Baron Channell.*—One object.

*Mr. Solicitor General.*—One object.

*Mr. Baron Channell.*—There are several others.

*Mr. Solicitor General.*—I believe the effect of the evidence to be this. I will endeavour to cite it fairly. Such apparatus is never used, or scarcely ever used, in merchant vessels; it is sometimes used in yachts. I will come to that part of the evidence. At page 106, in the evidence of Mr. Green, who has been speaking about this matter, the Queen's Advocate says, "I did not understand what you said about the hammock racks as to their resisting shot." Mr. Green says, "The original fixing of hammocks on the hammock racks was to resist shot from musketry, which they will do." That is to say, when they were originally introduced; that is what he means; and it is suggested that sometimes they were placed on board yachts for the purpose of bringing the hammocks on deck, and airing them; but still nobody who applied his mind to the matter at all could doubt that hammocks were in this vessel for the purpose of making the bulwarks still stronger than before, and protecting the crew from shot. The crew, no doubt, would kneel down and fire their rifles over the bulwarks, and the pivot gun would work over the bulwarks. I do not think that any human being could doubt that intention.

Now it appears to me that every one of these equipments which I have spoken of was an equipment which you can scarcely call *incipit* *usus*, but was an equipment peculiarly adapted for war, showing on the face of it that it was intended for war; and it is difficult to suggest what other equipments the vessel would have had to be complete, except a plate for the guns and the guns; that was all. Of course it may be assumed that the vessel, before she went out, would have had coals, and would have been in a state to take the sea. Nobody can doubt that at all.

*Lord Chief Baron.*—Why should you go away from the evidence of Captain Inglefield? I observe what appears to be a

ARGUMENT.  
 4th Day.

remarkable omission of a few words in the printed copy of the short-hand writer's note. It is at page 58. The words there are, "Of what timber is she built?—Principally of teak; her upper works are of other material; the kind of wood I cannot exactly say; but I should call her a strongly built vessel; certainly not intended for mercantile purposes, but she might be used and is easily convertible into a man-of-war." My note is this, "She is principally teak; strongly built; certainly not intended for merchandise; might be used as a yacht."

*Mr. Attorney General.*—Your Lordship's remark is quite just; the words "as a yacht" do not appear here.

*The Queen's Advocate.*—If your Lordship looks at the top of page 59 you will see that it is almost implied that that must have been said. Your Lordship is there reported to have used the words, "He said that she might be used as a yacht."

*Mr. Solicitor General.*—So that we may take it that Captain Inglefield entirely negatives the notion of her being adapted in any way for a mercantile purpose; but he says that she might be used as a yacht. That would narrow her use very much, but still, I have been referring to that part of her structure, and her furnishing and fittings, which appeared to me to be scarcely *ancipitis usus*, but that their appearance would induce almost anybody to suppose that they were more probably, at all events, intended for war than for peace. But then there were other equipments which, according to the view which we take, it is not immaterial to mention. I may state that there was a screw propeller by way of motive power, which would be equivalent to the sails of a sailing ship, and there were the masts and the ropes, and all the tackle, and so on.

My Lords, that is the substance of the evidence. I do not wish to fatigue your Lordships by going more into detail. Now I submit that if that evidence was unanswered, coupled with very clear evidence of intention, about which I should think there would no dispute,—that was a case in which the jury ought to have found a verdict for the Crown, assuming always that they believed the evidence of the witnesses; and I think you Lordships would say, that in the absence of witnesses called on the other side, there was no reason whatever for the jury not believing these witnesses. This part of the case depends chiefly on the evidence of Mr. Green, a highly respectable man, Captain Inglefield, and Mr. Black, as to the equipment and so on. As to the intent, that was proved by Mr. Da Costa, who deposed to what was said by Mr. Miller, and beyond all doubt Mr. Miller could have been called.

*Lord Chief Baron.*—There is some doubt whether that evidence was properly received.

*Mr. Solicitor General.*—It is upon the notes, and we must deal with it as a part of the evidence.

*Lord Chief Baron.*—I know that. I said that I thought I should imperil the case of the Crown by refusing to admit it.

*Mr. Solicitor General.*—My Lord, I do not desire now to

embark in that argument,—it is not necessary for my purpose. If it were, I should maintain that your Lordship was perfectly right in receiving that evidence. However, I will not discuss that question.

ARGUMENT.

5th Day.

My Lords, I therefore submit that first, according to our view, assuming that equipments *ancipitis usus* may be explained by the intent, there was manifestly an equipment, and manifestly an equipment with intent that this vessel should be used in the service of the Confederate States; and that the verdict in that view, at all events, is directly contrary to the evidence. Even assuming that not to be so, I apprehend that there was evidence of equipments of a warlike character in the sense which has been defined, and that the jury ought to have found for the Crown in the absence of any evidence to contradict or explain it. Upon the whole, therefore, I submit to your Lordships that this case has not been satisfactorily tried. It is no doubt the first occasion upon which a statute of very great importance and of very great difficulty in its construction has been presented to a jury, and it is not unlikely that there should have been some misapprehension and some miscarriage. For these reasons I submit to your Lordships, that it concerns not only the Crown but the whole country, whose interests are identical with those of the Crown, that a new trial should be granted, whereby the law may be settled and vindicated.

*Lord Chief Baron (to the Queen's Advocate).*—We rise at three o'clock on Saturday, but we will sit till four o'clock if there is any probability that the case will be finished by that time.

*The Queen's Advocate.*—I am afraid, my Lord, that that would not be possible.

[*Their Lordships consulted together.*]

*Lord Chief Baron.*—We will go on with this case on Monday at 11 o'clock.

## ARGUMENT—*continued.*

---

### SIXTH DAY.—Monday, 23rd November 1863.

---

ARGUMENT.

6th Day.

*The Queen's Advocate.*—My Lords, I am afraid that I must ask for a great measure of your indulgence, for unfortunately my voice has departed from me since I was here on Saturday, but I hope that your Lordships will have the kindness to bear with the sort of croak with which I am compelled to address you, in order that I may get through my argument.

My Lords, the discussion of this question has now occupied the time of your Lordships and the public for many days, but I do not think that any person competent to form a judgment upon the gravity of the question submitted to your Lordships' decision, and upon the possibly momentous result of that decision, will be of opinion that the length of time has been disproportioned to the importance of the subject. My Lords, it is quite true that these important results depend upon the construction of an English statute; and, my Lords, what has been often urged during the course of this discussion is equally true, namely, that this statute is now, perhaps with one exception, attempted to be put in force for the first time in this country. At all events, it is for the first time carefully and deliberately submitted to the decision of a court of justice. And, my Lords, perhaps upon that observation there naturally occurs the reflection, first, that the very circumstance of its now being so submitted for the first time would make it incumbent upon the Judge to be especially clear and distinct in the directions which he gave to the jury, and it also (if I may be permitted to say so) would furnish an excuse which every candid mind would admit for any possible misdirection or misconception of that statute, and of which the most accomplished Judge in this kingdom would not disdain to avail himself.

My Lords, although your Lordships are perfectly familiar with the rules which govern the construction of statutes, I will take the liberty of referring your Lordships to the expressions of my Lord Chief Justice Tindal in the case of the *Sussex Peerage*, which is in 11th Clark and Finnely, page 143. I think, my Lords, that nowhere is there found laid down with greater precision and accuracy the rule which ought to govern the construction of an English statute.



*Lord Chief Baron.*—What was the statute then in question?

*The Queen's Advocate.*—It was the Royal Marriage Act, my Lord. His Lordship says, "My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."

My Lords, I derive another proposition of law, (familiar, I dare say, also to your Lordships, but which, rather for my own guidance, I wish to mention at this time,) as it appears to me applicable to the construction of this particular statute, from Bacon's Abridgment, title "Statute," the second part of the "Rules to be observed in the construction of a statute;" it is in volume 7.

*Lord Chief Baron.*—In Bacon's Abridgment, title "Statute," there is a particular rule given for the construction of penal statutes, and the rule which you have been laying down and the rule which the Attorney General insisted upon with reference to advancing the remedy to meet the mischief does not at all apply, and never has been applied in this country, to the case of a statute creating a crime.

*The Queen's Advocate.*—With permission, my Lord, I was about to come to that in a moment.

*Mr. Baron Bramwell.*—Mr. Justice Crompton says that he never knew a golden rule which was worth anything at all.

*The Queen's Advocate.*—My Lord, I am sorry for that, because it would seem that there could never be any science of the law at all.

*Mr. Baron Bramwell.*—Nay, I beg your pardon, that is a very different thing. That is not the only case in which there is good sense in what Mr. Justice Crompton has said; but I think it is impossible to do more than to say that you must bring an honest mind to the interpretation of the statute.

*The Queen's Advocate.*—Yes, my Lord, but there are certain rules which have been acted upon in these cases. The words in Bacon's Abridgment which I was about to read are the following: "A statute ought, upon the whole, to be so construed that if it can be prevented no clause, sentence, or word shall be superfluous, void, or insignificant." Now I shall take the liberty of drawing your Lordships' attention to the special application of that rule, if it be a good rule, to this statute. And your Lordships will find, when we come to con-

ARGUMENT.

6th Day.

sider the words "equip, furnish, fit out, or arm," that if this be a sound canon of construction, it will have a great bearing upon the exposition of that part of the statute.

*Lord Chief Baron.*—Then it is very remarkable that the Attorney General at the trial did not address either to me or to the jury one syllable as to any distinction between those terms. The prosecution on the part of the Crown is apparently upon the footing, that although there may be a distinction, it is not worth telling the Judge or the jury what it is. That is a fact.

*The Queen's Advocate.*—I am sure that your Lordship would not require me or expect me to enter into any discussion of the discretion which the late Attorney General exercised upon that occasion. I must leave that to your Lordship's own opinion. I can only say this, and I am bound to say so humbly——

*Lord Chief Baron.*—I take it for granted that the case was conducted on the part of the Crown after full consultation with the present Attorney General, then the Solicitor General, who was in Court the whole time; and from the beginning to the end of the case the Attorney General never intimated the slightest difference between "equip," and "furnish," and "fit out." He said not one word about it. If, therefore, that is to affect the construction of the statute, it is now presented to us for the first time, at least in this argument.

*The Queen's Advocate.*—My Lord, the question of the late Attorney General's mode of conducting the case has been often discussed during this debate, and I should be very loth to enter into it again; but I think I am bound to say that really our opinion was that he did conduct the case with very great ability and perspicuity. I am sure that your Lordships will be of opinion that there is no reason why I should not address my argument, even if your Lordships were to hear it for the first time, if it be worth hearing at all, and why I should not submit it to your Lordships' attention. My Lords, I therefore say that the particular passage which I have read as to each word having its meaning, and as to there being a canon of construction which forbids you to argue that the Legislature dealt in a superfluous expression unless you are compelled to do so, has a great bearing upon the construction of this Act.

Then the Lord Chief Baron reminds me, as has been often said during the course of this discussion, that this is a penal statute, and therefore his Lordship seems to think that neither the authority cited by the Attorney General nor that cited by myself has a bearing when the peculiarity of the statute is considered. Now I beg to draw your Lordships' attention to the opinion expressed upon this point by a most eminent Judge, not indeed a Judge of this country, but by a Judge whose opinion nobody need be ashamed of following, I mean the opinion of Chief Justice Marshall, in the United States, and I quote from the fifth volume of Wheaton, page 95. The case is that of *The United States against Wittberge*, and he is there construing a criminal statute,

with which I need not trouble your Lordships. He is citing a statute respecting manslaughter upon the high seas, and he says, "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the Court, which is to define a crime and to ordain its punishment." Then there follow these words, "It is said that, notwithstanding this rule, the intention of the law-maker must govern the construction of penal as well as of other statutes. This is true, but this is not a new independent rule which subverts the old; it is a modification of the ancient maxim, and it amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the Legislature has obviously used them, would comprehend." Now, my Lords, by that canon of construction I should be quite willing that this case should be tried.

*Mr. Baron Bramwell.*—It seems to me, with great respect, that that is very little more than saying that you are not to misconstrue the laws.

*The Queen's Advocate.*—I suppose, my Lord, that every canon of construction would ultimately resolve itself into that.

*Mr. Baron Bramwell.*—It seems to me scarcely to be in words more than an elaborate statement that you are not to misconstrue them because they are penal laws.

*The Queen's Advocate.*—That you are not to narrow the meaning out of a mistaken tenderness to the individual, so as to defeat the public policy of the Act.

My Lords, with respect to the application of the rule to this particular statute I have one other authority. I will ask your Lordships to allow me to read a passage from Mr. Justice Story's judgment in the case of the "*Gran Para*," which will be found in 5th Curtis's Reports, at page 304. I need not trouble your Lordships with the whole of the case, as I am only reading it for the maxim which it contains. He says, speaking of the "*Irresistible*," sailing out of the port of Baltimore, "She was not commissioned as a privateer, nor did she attempt to act as one until she reached the river La Plata, when a commission was obtained, and the crew re-enlisted. This Court has never decided that the offence adheres to the vessel whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed; and as the '*Irresistible*' made no prize on her passage from Baltimore to the river La Plata, it is contended that her offence was deposited there, and that the Court cannot connect her subsequent cruise with the transactions of Baltimore." Now upon this it appears to me

ARGUMENT.  
 6th Day.

that Mr. Justice Story's words are well worthy of attention. "If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as their enforcement depends on the restitution of prizes made in violation of them; vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired." Then follow these words, "This would indeed be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe."

Then my Lords, the question immediately arises, what was the real object of this statute? and your Lordships cannot have failed to observe the very different objects which, during the course of the speeches addressed to your Lordships, have been assigned for this statute. Now, my Lords, it is perhaps worthy of observation, that in the original speech which my learned friend Sir Hugh Cairns made in this case, not indeed directly addressed to the jury, but addressed to the Judge in the presence of the jury, he expressed himself in the following language; this is at page 142 of the book; this was stated to my Lord before he turned round to address the jury; it is about 12 or 14 lines down the page: "The equipment is supposed to be with the intent that 'the ship or vessel should be employed in the service of a foreign state' 'as a transport or store ship,' and in order to make up the idea indicated in those words your Lordship will observe that the vessel must be employed by a 'foreign state,' and the purpose for which the foreign state is to employ her is 'as a transport or store ship;' and the latter words showing for what purposes, against any other prince or foreign state. But then, having got to the end of the clause which spoke of the 'transport or store ship,' we commence with a new clause in the alternative, 'or with intent to cruise or commit hostilities against any prince.' The question is, to what is that last clause, 'or with intent to cruise or commit hostilities' to be referred? I apprehend, on every principle of construction, that clause must be referred and carried back to the words 'ship or vessel,' and must be read as an alternative to the other clause, which likewise begins with the words 'with intent.' So that, as your Lordship will see, there is an alternative supposed by the Act of Parliament, equipping and arming any ship or vessel with either of two intents, and we must accurately discriminate what those two alternative intents are. The one of the two alternative intents is the one I have already read and spoken of, that the ship should be employed in the service of a foreign state as a transport or store ship; the other alternative intended is," (I pray your Lordships' attention to these words), "that she should be equipped with intent to cruise or commit hostilities; and the whole is over-ridden by the introductory words, that

"there is to be some person, the words are, 'if any person,' within Her Majesty's dominions who is supposed to equip and arm a ship or vessel with one or other of these two intents. You must have a person; you must have him within Her Majesty's dominions; you must have him equipping, furnishing, fitting out, or arming (whatever that may mean we will consider afterwards) a ship or vessel, and you must have him doing so with one of two intentions." Then follow these words, "The other is the alternative intention, that she shall cruize and commit hostilities, with no reference there to whether she is or is not to be employed in foreign service."

ARGUMENT.

6th Day.

*Lord Chief Baron.*—I think you need hardly press the question at all. I believe that we were all satisfied that the correction of this part of Sir Hugh Cairns' address by the learned Attorney General was quite right, and that this clearly does not require any comment at all.

*Mr. Baron Bramwell.*—That would be a prohibition of piracy simply, would it not?

*The Queen's Advocate.*—Yes, my Lord.

*Mr. Baron Bramwell.*—For ships to cruize not in the service of any state would be piracy, would it not?

*The Queen's Advocate.*—Yes, my Lord, and therefore I was contending that this construction of the Act was manifestly an incorrect construction. My Lords, the use which I was about to make of the citation was this, that this was an argument, so to speak, addressed to his Lordship in the presence of the jury, who shortly afterwards decided the case; and I must take the liberty of saying that I very greatly doubt whether the jury were fully convinced that this argument had nothing whatever to do with the case, which now appears to be admitted to be the fact. I very much doubt whether the jury's minds were entirely free from the notion that possibly this Act was directed against privateering.

*Lord Chief Baron.*—I rather think you will find that the learned Attorney General who had an opportunity of addressing the jury, and of removing all error from their minds, thought it hardly worth while to notice this fact.

*The Queen's Advocate.*—That may certainly be the case, my Lord; but, as a matter of fact, I was mentioning that this particular construction was put upon the Act at that time (what effect it might have had upon the jury I do not know), and I was dealing with the fact for two purposes; first, to mention to your Lordships that fact; and secondly, to show the difficulties which those who contend for the claimants in this case have been put to during the course of the argument in order to, what I must call, after all that has been said, evade the plain meaning and words of the statute.

*Mr. Karlake.*—Might I call your Lordships' attention to this fact? At page 211 of the small book, when the learned Attorney General was commenting upon that construction which had been

ARGUMENT.  
—  
6th Day.  
—

put by my learned friend Sir Hugh Cairns, the Lord Chief Baron said that he did not agree with that expression, and there was an end of that argument—"In that I own I do not agree."

*Lord Chief Baron.*—I wish that you would use the same edition as we have. You say that it is at page 211; what is it that you are referring to?

*Mr. Karlake.*—I was mentioning, my Lord, that when the learned Attorney General was replying and commenting upon the construction which Sir Hugh Cairns put, your Lordship said that you did not agree in that construction, and there was an end of the argument upon that matter.

*Mr. Kemplay.*—It is at page 201 of the large book.

*The Queen's Advocate.*—My Lord, I have no doubt that that is so.

*Mr. Baron Bramwell.*—Will you allow me to cite a book by an author who, I regret to say, is no longer living, I mean Mr. Sedgwick, an American writer on statutory and constitutional law. He there makes this remark with respect to penal statutes: "But the rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one, or rather it has been in modern times so modified or explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative meaning expressed in the enactment, the Courts refusing on the one hand to extend the punishment to cases not clearly embraced in them, and on the other hand equally refusing, by any forced and nice construction, to exonerate parties clearly within their scope." That is at page 326. He cites a great number of authorities for that statement. This is the author of the book upon Damages.

*The Queen's Advocate.*—That would appear to me to be excellent sense.

*Mr. Baron Bramwell.*—It is excellent sense, as anything I am sure from Mr. Sedgwick would be.

*Mr. Attorney General.*—My Lord, I may be permitted to say that it has always seemed to me that the meaning of the old rule (supposed to make a distinction) was this: In ancient times wonderful liberties were taken to strain statutes so as to include matters plainly not within their words; it was said that those liberties were not to be taken with penal statutes. We now do not take them with any statutes.

*Mr. Baron Bramwell (to the Queen's Advocate).*—That which I have read is your proposition?

*The Queen's Advocate.*—Yes, my Lord, and it agrees very much with the passage which I read from Wheaton.

*Mr. Baron Bramwell.*—Entirely, I should say.

*The Queen's Advocate.*—I am much obliged to your Lordship.

*Mr. Baron Bramwell.*—I cited it for the purpose of showing what I think is a good rule, and also out of the great respect which I have for the memory of the author.

*The Queen's Advocate.*—My Lords, still upon this question of

what is the object of the statute, and it being admitted that that construction which was confined to privateering is necessarily abandoned as untenable, I come to consider the objects which have been assigned to this statute during the progress of the present argument, and of course it has not escaped your Lordships that they have not been at all uniform on the part of the counsel who appear for the claimants. My learned friend Sir Hugh Cairns has adopted an argument which I confess appears to me, with great respect to him, to be of rather a fanciful character. He lays down two rules, and his second rule, he says, is this; it is at page 10 of his speech of Tuesday last, "The territory of a neutral power must be kept absolutely inviolate from anything which may be termed a proximate or immediate act of war, and and the neutral Government will have a right to complain if that inviolability, so defined, of the neutral territory is infringed either by the belligerent directly or by one of its own subjects at the instigation of the belligerent." Then, my Lords, at page 14, he lays down this doctrine. He says that he will not examine the curious point as to the cannon-shot distance from the shore; but he says, "a line is to be drawn somewhere;" and then he says, "We find that according to the rules of international law it is allowable to a neutral state and to the subjects of a neutral state to carry and to deliver outside that line or inside it any of those articles which are called contraband of war, guns, ammunition, ships, or any other article which may be supposed. International law also holds that you might bring a ship to the outside of that boundary wherever it is drawn; that you might carry from the neutral state guns and ammunition and warlike supplies of every kind, and deliver them into the ship outside the boundary, subject to the right of capture; the other belligerent, if so disposed and so able, might intercept the supplies, might capture the ship, and might seize the articles as contraband; but subject to that, the act might be done without any offence against the principles of international law." Then, a little further on, at page 16, he puts into the mouth of the belligerent a sort of speech, the whole of which I need not read to your Lordships, but he says, "The belligerent would say to the neutral power 'You on your part must take care that what passes out of your territory shall pass out in such a state as that I shall have a fair chance of capturing or dealing (if I am entitled to capture or to deal) with it.'" And a little above that place he says, "You would not be allowed to go inside a neutral territory, and arm and prepare for hostilities in a way calculated to commit hostilities, a ship which afterwards might sally out of the neutral territory, go beyond the limit." And then there occur these very curious and remarkable expressions, "And without any intervening space occurring in which it might be captured by the belligerent power, commence hostilities with a ship so armed." So that I understand the position of international law, which Sir Hugh Cairns contends for, to be this, that it was

ARGUMENT.

6th Day.

ARGUMENT.

6th Day.

an object of this statute, among others, to provide that a vessel might go out not armed, but all but armed in every other respect, to the boundary line, and that then there must be an intervening space in which the belligerent must have the right of capture, and that after that intervening space is passed over, it would be perfectly lawful to put arms on board. Now, my Lords, I heard no authority cited for that position ; it is perfectly novel to me. I think that it has not the warrant of any international jurist, or any decision of an international tribunal, but it does go a long way to satisfy me of the very great difficulties which those who argue for the claimants are placed under when they attempt to get rid of the plain words of the Foreign Enlistment Statute, which effectually provides, as I should construe it, against such a substantial and practical violation of neutrality as would be committed in the circumstances mentioned by Sir Hugh Cairns. The doctrine of the necessity of an intervening space after you have left the boundary line, is a doctrine invented only to explain away the obvious difficulty of allowing captures to be made in this way by a vessel equipped in a neutral port.

Now my learned friend Mr. Mellish says that the object of this statute was to prevent an insult to this country, and he says that international legislation, like municipal legislation, waits till the mischief has happened. Mr. Mellish says, as I understand him, applying this doctrine to the construction of this Act, that international legislation waits, as municipal legislation does, till the mischief has happened. Now there I take the liberty of joining issue directly with my learned friend. I say that it is a forgetfulness of the great peculiarity of this statute which runs through the whole of the argument on the other side. The statute is essentially a preventive statute, and so far from waiting, as my learned friend says, till the mischief has happened, it in a manner most peculiar, and by a machinery entirely its own, directed partly against individuals, whom it divides into two classes, the principal actor and the subordinate actor, and partly against the instrument of the individual, the ship itself, endeavours to prevent the evil from being committed, and it gives the Crown the immense power of seizing the vessel, as *ipso facto* forfeited by the particular act of either of these individuals. Therefore, I humbly submit to your Lordships, that to omit taking into consideration that characteristic of the Act of Parliament is to lose one of the main keys to its construction, and one of the principal clues by which you are able to thread the labyrinth of the words in which the idea is expressed.

*Lord Chief Baron.*—It should be observed that a considerable part of the enactment is unnecessary. For instance, when it is pronounced to be a misdemeanour to do a certain act, by the common law, if a matter is created a misdemeanor it is a misdemeanor to attempt to do it, to begin to do it, or to aid or assist in doing it. That part of the statute with respect to aiding, assisting, endeavouring, and so on, was not necessary ; but it was necessary to put those words in in order to create



the forfeiture. If a particular act is made a misdemeanor, punishable by fine and imprisonment, I take it that the endeavouring to do it, or the aiding and assisting to do it, becomes immediately another misdemeanor, and I think that all misdemeanors are punishable unless forbidden to be so. The ordinary mode of punishing crime in this country is either by fine or imprisonment, or both.

*The Queen's Advocate.*—Yes, my Lord.

*Lord Chief Baron.*—Unless the statute had mentioned those matters and annexed the forfeiture to the attempt, it is tolerably clear that where the act applied the forfeiture to the commission of the offence, it would not follow that the forfeiture would attach to the commencement of it or to the attempt.

*The Queen's Advocate.*—My Lord, my learned friend Sir Hugh Cairns in construing this Act had recourse to two distinct heads of argument; he said, as I understand him, “I will look at what was *a priori* probable, I will consider what it is likely, regard being had to the history of the times, would be introduced into this Act; and I will afterwards consider whether the words which have as a matter of fact been introduced are or are not in accordance with what one would probably expect to have found there.” Now I do not propose to follow my learned friend at any length into that very agreeable and enlivening part of the discussion of this case, namely, the history which immediately preceded the Act of Parliament. It might be and I suppose was quite competent to my learned friend to introduce a narrative of all those circumstances by way of placing your Lordships in the position of the legislature, and enabling you to arrive at the meaning of the words: pretty much in the same way as in the interpretation of a will we are in the habit of hearing that the Court must be put in position of the testator and know all the circumstances. In the same way, I presume, it was quite competent to my learned friend to enter into that discussion, which he did most ably, as he always does everything which he undertakes, and to entertain your Lordships (for I think I must use that expression) with the extracts from Mr. Canning’s speeches, and from those of other Members of Parliament who took part in the debates upon the Foreign Enlistment Act. My Lords, I am not about to follow my learned friend.

*Lord Chief Baron.*—The Court of course would bear with much from the defendant’s counsel which perhaps it might object to on the part of the prosecution. I own that it strikes me that speeches in Parliament and historical statements by a very eminent historian, Alison’s history for instance, and some of those other matters, it is difficult to stop in an argument to set out what a defendant in a case may think necessary to state, but that mode of dealing with a legal question should be administered with a very sparing hand.

*The Queen's Advocate.*—I quite agree, my Lord, that I should have thought so too. If it was an error, I am not going to fall

ARGUMENT.

6th Day.

ARGUMENT.

6th Day.

into it ; but, my Lord, as one never knows exactly what words do or do not, and what passages read do or do not, leave a sort of impression upon the minds of those who hear them, because it is impossible for any human being to say——

*Lord Chief Baron.*—I should say that it should be *parca manu*, and would very soon become *satis*.

*The Queen's Advocate.*—*Parcissima manu*, my Lord. I have not the least objection to that.

*Mr. Attorney General.*—I do not think that I troubled your Lordships in that respect.

*Lord Chief Baron.*—Mr. Attorney General, I have no complaint to make of anything which fell from you certainly ; and indeed do not let it be supposed that I make any complaint with reference to Sir Hugh Cairns. I merely meant to advert to this, that many topics may be urged on the part of a defendant, as to which one does not immediately know in what they are to end. If the learned advocate for a defendant thinks that the matter is material, it is extremely difficult for the Court to say that it is not so.

*The Queen's Advocate.*—My Lord, I hope that I shall not sin in this matter, or incur your Lordships' displeasure. I was only about to say, that it is very difficult, where extracts have been read in a very emphatic manner to the Court, to say how much of the reasoning of those extracts may remain in the mind of the Court.

*Mr. Baron Bramwell.*—Any one or more of four minds.

*The Queen's Advocate.*—Exactly so, my Lord. I was not going to enter into any detail, but I think that when Mr. Canning's speeches are referred to, and you are called upon to gather from them that the intention of this Act was simply to enforce existing international law, it is only fair to read the following extract, which is in a very few lines. Mr. Canning said : " The House had to determine, first, if the existing laws " would enable her to maintain her neutrality ; secondly, if the " repeal of the laws would leave the power of maintaining that " neutrality ; and, thirdly, if both the former questions were " negatived, whether the proposed measure was one which it " was fit for the House to adopt." That is in volume 4, page 151, of Canning's speeches, and it does, I think, express in clear language the principal object of the Act itself. The object of the Act was to enable the Crown to maintain its neutrality ; that I consider to be the real object of the Act, and it is very well expressed in that passage.

My Lords, I might also say without going, as your Lordships seem to intimate that one ought not to go, further into that part of the case, and I am sure I do not in the least wish unnecessarily, for physical reasons as well as others, to occupy unnecessarily the time of the Court, that it will be in your recollection that Sir Hugh Cairns, in explaining the object of this Act, entered into a discussion of the distinction which, as a matter of international law, is to be made between the acts of the individual and

the acts of the state. Now, my Lords, that is a branch of the argument of no mean importance, because my learned friend Sir Hugh Cairns made use of it, as I understood, in this way. He said, "There are certain acts which the individual may do, and which in one sense are lawful, that is to say, they are not prevented by the positive law of his own country; and those very same acts, if done by the Government, might be a breach of international law;" and he instances the case of contraband. He says that the contraband carried on by the individual is no offence, but that a contraband, or any act of a like nature, aided or assisted, or carried on by the Government, would be a breach of international obligation.

Now, my Lords, if considerations of that kind are to have any weight at all with your Lordships, if you are to consider at all that you can arrive at the meaning and the object of the Act from any *a priori* considerations, it is worthy of your Lordships' attention that there are no two propositions of international law better founded, I think, than these, that there are acts done by individuals which do (regard being had to the number of them, and the occasion of them, and the manner) sometimes, and not unfrequently, implicate the state, and that it is an unquestionable proposition of international law that the state is presumed to know such acts of its subjects as I have described, and moreover to have the power of repressing them; and that it is no answer to a foreign Government to say, "Very true, there came out of the port of Liverpool 25 'Alabamas,' or 25 'Oretos,' which have destroyed the whole of your commerce upon these seas, but then they were the acts of an individual shipbuilder,—they were the acts of A, B, and C, and do not come to the Government, for the Government has nothing to do with them."

My Lords, I protest earnestly against that doctrine; I believe it to be wholly unfounded in reason; I believe it to have no warrant in international law; and, my Lords, without occupying your Lordships' time with any pedantic display of learning, I venture to say that the question, which civilians are in the habit of considering under this title, "*Civitas ne deliquerit an cives*," "is this an offence in which the state must be held implicated, or is it an offence confined to the individual?" is one of the most interesting parts of the international law which is called "*nobilissima quaestio juris gentium*," and I will give your Lordships references to certain jurists where you will find it most ably discussed. Your Lordships will find it in Grotius, book 2, chapter 21, under the title of "*De Poenarum Communicatione*;" and he enters into it with all his learning, and shows that there are acts of the individual of which the Government cannot be supposed to be ignorant; at all events, that the maxim is a sound one, that the will of the individual is bound up with the will of his country upon those occasions, which furnishes no answer on the part of the state. Your Lordships will find a commentary upon that chapter of Grotius in "Heineccius's Commentaries."

ARGUMENT.

6th Day.

*Lord Chief Baron.*—What volume?

*The Queen's Advocate.*—It is all in one volume.

*Mr. Baron Channell.*—The only edition which I have is in six volumes.

*The Queen's Advocate.*—No, my Lord; not upon Grotius. There is only one volume upon Grotius. It is a commentary upon Grotius's work, and it is his commentary upon book 2, chapter 21. And, my Lords, there is a very clear and valuable writer I think, though now not much thought of, but of whom Sir James Macintosh thought a good deal. I refer to Burlamaqui's *Principles of Politic Law*,—it is in volume ii. of the London edition, page 255, and he enters at great length into this consideration. I will just read to you Lordships a very short part of it. He says, "We may further observe that in civil society, " when a particular member has done an injury to a stranger, " the Governor of the Commonweal is sometimes responsible for " it, so that war may be declared against him on that account. " But to ground this imputation, one of these two things is " necessary, viz., either that the Sovereign has suffered this harm " to be done to the stranger, or that he has offered a reprieve to " the criminal. In the former case it must be laid down as a " maxim that a Sovereign who, knowing the objects of his " subjects, suffers them to practice piracy on strangers, renders " himself criminal, because he has consented to a bad action, the " commission of which he has permitted, and consequently " furnished a just reason of war."

Something to the same effect is to be found also in Vattel, though more loosely. And here I may take the liberty of saying, with respect to the citations from Vattel which were made by Mr. Mellish, that it is always to be borne in mind that upon a question of this description Vattel is a most untrustworthy authority, because being a Swiss himself, and having been accustomed to enormous enlistments of soldiers going out of Switzerland, he occupies a portion of his book in defending that as being no violation of the law of nations. His bias was greatly affected by that particular fact, and upon that peculiar point he is not a very good authority.

Now, my Lords, I think that I am entitled, although they do occur in a parliamentary form, to read to your Lordships the expressions of the Judge of the High Court of Admiralty when he sat in Parliament; I refer to no less a man than my Lord Stowell; because what he said was on rising in his place as the Judge of the High Court of Admiralty, and holding a neutral position.

*Lord Chief Baron.*—Was that in the House of Lords?

*The Queen's Advocate.*—No, my Lord, in the House of Commons; I will give your Lordships the exact words. At all events, I will make them my own for the sake of the argument. Your Lordships will find them in Hansard's *Debates*, vol. 40.

*Mr. Baron Bramwell.*—I cannot see why that is not as citable as Burlamaqui. I do not see why Sir William Scott's opinion

in the House of Commons is not as much a matter to refer to as Burlamaqui or anything else. ARGUMENT.

*Lord Chief Baron.*—Or a speech of Mr. Canning in the House, or of Mr. Huskisson, who quoted Mr. Canning. 6th Day.

*The Queen's Advocate.*—Yes, my Lord. I did not mean to travel into that particular class of citation, but I think this is really exceptional from its character. It was on the debate in 1819.

*Lord Chief Baron.*—That which is sound sense upon the subject in hand before us, and expressed in clear language, must always be welcome, from whatever source it comes or whenever it was delivered.

*The Queen's Advocate.*—It comes with great authority from Sir William Scott, and this is what he says, "There could be no solecism more injurious to itself or more mischievous in its consequences, than to argue that the subjects of the state had a right to act amicably or hostilely with reference to other countries without the interposition of the state itself. It was hardly necessary to press these considerations, because all the arguments which he had heard upon the subject had fully admitted that it was the right of states, and of states only, to determine whether they would continue neutral or whether they would assume a belligerent attitude; that they had the power of preventing their subjects from being belligerent if they agreed to it." There is also language which I would, without mentioning where it comes from, make part of my speech. "When ships were employed in the service of any power whatsoever without a licence from the British Government, such an enactment as this was required by every principle of justice; for, when the state says, 'We will have nothing to do with the war waged between two separate powers,' and the subjects in opposition to that say, 'We will, however, interfere in it,' surely the House would see the necessity of enacting some penal statute to prevent them from doing so, unless, indeed, it was to be contended that the state and the subjects who composed that state might take distinct and opposite sides in the quarrel."

Now, my Lords, these arguments and these citations I really do think have a direct bearing upon this part of the case, because they go in aid of my proposition, that the real object of this statute was to enable the Crown to observe not a nominal but a real and practical neutrality in these cases; it was to place the Crown in a position in which it might have an answer to foreign states when they said, "Out of your harbours come all these privateers, and all these armies of men come out of your country." It was to enable the Crown not to punish, but to prevent such proceedings taking place, and thereby, in plain English, to enable this country to remain at peace.

My Lords, permit me to make one more citation upon this point from the Life of Washington, by Chief Justice Marshall. Perhaps your Lordships may have read the book; it is a book

ARGUMENT.

6th Day.

of very great authority upon any questions of law which are contained in it, because it was written, I believe, by Chief Justice Marshall after he was Chief Justice. In the fifth volume, at page 488, where he is speaking of the very Act about which so much has been said, namely, the first Foreign Enlistment Act of the United States, he uses these words: "It being confessedly contrary to the duty of the United States, as a neutral nation, to suffer privateers to be fitted in their ports as a neutral territory, it seems to follow that it would comport with their duty to remedy the injury sustained, if in their power to do so. That the act has been committed before the Government could provide against it might be an excuse, but it is not a justification. Every Government is responsible for the conduct of all parts of the community over which it presides, and is supposed to possess at all times the means of preventing an infraction of its duty towards foreign nations."

And now, my Lords, I would address myself to the part of the argument which has reference to the variety of words which the legislature has used to prevent the commission of this offence: "equip, furnish, fit out, or arm;" and I claim in aid the maxim from Bacon that you are not to presume that these words are superfluous unless you are compelled to do so by the whole gist and scope of the statute. Now, my Lords, there occurs this remark immediately. If arming alone was intended to be struck at, which is the proposition on the other side, what on earth would have been easier than to have left out "equip, furnish," and "fit out"? If the legislature intended only to strike at the overt offence of arming, it was really heaping words upon words for the purpose of misleading those who had to put in force the Act.

*Lord Chief Baron.*—I suppose that you will favour us with the distinction between "ship" and "vessel."

*The Queen's Advocate.*—My Lords, there is no doubt a distinction between a ship and a vessel; there may be, at least, a very great distinction between a ship and a vessel.

My Lords, it is said on the other side that this argument applies equally to the omission of the word "build," and it is said upon the other side, "what would have been easier than to have put in the word 'build' if it was intended to prevent the building of ships, and not merely the hostile equipment of ships?" My Lords, I think that there are good reasons for the omission of that word. It was intended not to interfere with ship-building, properly so called,—it was intended, my Lords, not to raise any question, as I should imagine, as to the property of the shipbuilder in any way,—in any of those commercial questions which are familiar to your Lordships, as to when the property may pass from the shipbuilder into the hands of the orderer, and so forth. It was intended to avoid all the questions which might possibly arise from "building," as distinct from "furnishing, fitting out, equipping, or arming." And, my Lords, some sanction to this argument (I do not press it further) is

derived from the American Foreign Enlistment Act, in which the words "building and equipment" do occur in portions of it, but as to which no one of the judicial decisions which have been given on the construction of the Act makes any remark whatever as to its having any effect beyond that of "equip, furnish, "fit out, or arm." Your Lordships know that the words "building and equipment" do occur in one of the portions of the American Enlistment Act.

*Lord Chief Baron.*—In one of the American Acts the word "build" does occur.

*The Queen's Advocate.*—I say so, my Lord.

*Mr. Baron Bramwell.* — "The materials for building," I think.

*The Queen's Advocate.*—It is so, my Lord.

*Mr. Baron Bramwell.*—The materials for building are forfeited.

*The Queen's Advocate.* — I will read your Lordships the passage: "together with all materials, arms, ammunition, and "stores which may have been procured for the building and "equipment thereof."

Now, my Lords, I submit to your Lordships' attention this argument, in the first place, that the word "equip" has a well-known mercantile and legal sense as well as an ordinary etymological sense. The word "equip" will be found used over and over again in the judgments of Sir William Scott, or my Lord Stowell, during the prize cases which were disposed of during the war. And your Lordships will see this (and it has a bearing upon the other parts of the argument), that he continually speaks of ports of a mercantile equipment and ports of a military equipment, and he is continually considering when these cases are brought before him, whether the equipment is of the one character or of the other, and deciding the case with reference to the destination of the vessel and the intent of the equipper.

Now, my Lords, I think that it is not wholly inapplicable to refer your Lordships to the etymological meanings of the word which are given in various dictionaries; I say it cannot be wholly inapplicable, for the Lord Chief Baron himself, in summing up to the jury, cited them from Webster's Dictionary. Now, I think that almost the best definition which I have found is in Todd's Johnson's Dictionary. I there find the following statement: "It is properly a naval term, *equippe* being the old French for a sailor, and so used in the 13th century, derived "perhaps from the barbarous Latin *eschipare*, to furnish or adorn "vessels, whence *echipper* or *equipper*, as Janius has observed, "was easily formed. See also Du Cange on *eschipare*. And "thus our own word was also first written *esquippe*, and used "in the naval sense, as by Barret in 1580, to equippe or furnish "ships with all ablements." That is a word which we do not use now, but still it meant all that was necessary to enable the manning of a ship.

ARGUMENT.

6th Day.

ARGUMENT.

6th Day.

My Lords, in the French Dictionary de l'Académie, under the word *équipement*, you will find a doctrine to the same effect. I will also refer to Miltitz's *Manuel des Consuls*, a very learned work,—it is upon the meaning of all the commercial treaties where the words occur,—he sets out at length all the commercial treaties. In his first volume, and at page 13 of the Appendix, he says, "Equipment, qui comprend aussi les gens de l'équipage et les vivres," which I submit is clearly the right meaning of the word,—it comprehends the manning and victualling of a ship; and in volume 2, page 415, and at note 4, he is drawing a distinction between *bagage* and *equipage*; he gives the Latin for "*equipage*" in this way,—"*viaticus apparatus*." Now it is familiar to all who practise in the Admiralty Court that the words which are used in protest are "her tackle, apparel, and "furniture."

There is a book also of some merit, called "Burns's Naval and "Military Technical Dictionary of the French Language." I hold the book in my hand, and under the title *équipement* he says: "Armament, manning, accoutrements, stores for the "voyage;" and under the title *équiper*, he says "to equip, fit "out, arm, provide, and furnish,—provide with necessities or "stores,—supply, stock, and so forth."

Mr. Baron Bramwell.—I should think that the defendants would not object to the definition that to "equip" meant to man and to victual.

The Queen's Advocate.—Not necessarily to man, my Lord. It comprehends that, and putting stores—anything towards furnishing the ship in that way.

Mr. Baron Pigott.—I dare say you know "Falconer's Marine "Dictionary." I have looked at it, and he says, "A term frequently applied to the business of fitting a ship for sea, or "arming her for war."

The Queen's Advocate.—Yes, my Lord; that exactly bears upon what I was about to cite from my Lord Stowell's judgment in 5th Robinson, page 314. It was the case of the "Charlotte." It was a case of contraband masts, Russian property, and so on. Lord Stowell says: "It is then said that the "cargo was going to the public arsenal of the enemy. It was "going to Cadiz, which is a place of great military equipment; "but it is a place of great mercantile equipment also; and it "does not appear, I think, exactly as it has been represented, "that those articles were to be delivered to the public arsenal of "the state. What has been said on the other side is, I think, "true, that the nature of the port is not material, since masts, if "they are to be considered as contraband, which they will be "unless protected by treaty, are so without reference to the "nature of the port, and equally whether bound to a mercantile port only, or to a port of naval military equipment. "The consequences of the supply may be nearly the same in "either case. If sent to a mercantile port, they may be there



" applied to immediate use in the equipment of privateers, or  
 " they may be conveyed from Nantes to Brest, and there become  
 " subservient to every purpose to which they could have been  
 " applied if going directly to a port of military equipment,"  
 Therefore, the argument which I wish to found upon this is, that  
 the word "equipment" is clearly not necessarily connected with  
 military equipment, and unless you are to import into this  
 statute after the word "equip" the words "for warlike pur-  
 " poses," or say equip in a manner which will give a definite  
 warlike character to the word, unless you are to import those words  
 into the Act, the maxim of Bacon stands unshaken, and there is a  
 distinct meaning to be given to "equip" quite in consistency  
 with the whole purview and bearing of the Act, which is not to  
 step in when the act is done and punish, but to prevent the com-  
 pletion of a particular act which implies a continuance, something  
 going on and being done, and surely that would be a very good  
 reason why the word "equip" should be used, a word well known  
 to all nautical men, well known to all commercial men, having a  
 meaning which there was no reason to suppose was not present  
 to the Legislature at the time, and a meaning perfectly consistent  
 and in keeping with the whole spirit and purview of the Act.

My Lords, my learned friend the Attorney General cited to  
 your Lordships the case of the "Richmond" in this volume, and  
 it may be convenient to refer also to the case of the "Brutus,"  
 which was decided by the Lords of the Privy Council; and there  
 were several cases, a summary of which is thus given by the  
 learned editor in the Appendix: "It will appear from the com-  
 " parison of these cases, that though the principle of considering  
 " the sale of ships of war to the enemy as contraband is strictly  
 " held by the decisions of the Court of Appeal, the application  
 " of the principle has been restricted to cases in which no doubt  
 " existed as to the character of the vessels or the purpose for  
 " which they were intended to be sold."

*Mr. Baron Channell.*—Is that in the same volume, namely,  
 5th Robinson?

*The Queen's Advocate.*—The same volume, my Lord, 5th  
 Robinson, in the Appendix.

Now, my Lords, it is said, as I understand, "Well, but this word  
 " 'equip' and your mercantile equipment are words *incipit*  
*usus*," and a great deal is made of that argument in substance  
 throughout the whole of the address of my learned friend Sir  
 Hugh Cairns, and the addresses of those who followed him.  
 It is said, that the Act interfering with the liberty of the  
 subject, and with the prerogative of the subject, never meant  
 to deal with the matter, or to attach criminality to a ship  
 for that class of equipment which might or might not be of a  
 certain character. Now, my Lords, I dissent entirely from that  
 opinion. In the first place, my Lords, the very expression  
*incipit usus*; the very word *anceps*, or "doubtful," implies that  
 the equipment is fit for both; it implies that it is fit for one and

ARGUMENT. for the other, and then you will bear in mind the intention of the Act, which was to prevent.

6th Day.

My Lords, there were during the war (and I mention it to your Lordships because it may possibly furnish some contribution towards elucidating the difficulties of this case), as I have no doubt your Lordships are aware, a vast number of cases brought before my Lord Stowell upon the question of contraband. He had the duty imposed upon him of considering in all its bearings the meaning of this phrase, *incipitis usus*; and in one judgment, my Lords, in 1st Robinson, pages 194 and 195 (the name of the ship was the "Jonge Margaretha"), he thus most perspicuously, I think, expresses himself upon this point. It was a question of whether hemp and cordage, and other articles of that description, were or were not intended for warlike uses; and he says, "The most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. Contra, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption." Then he gives, in a passage, often cited since, his definition of articles *incipitis usus*, "For it being impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination." Now I claim the application of that principle. It is not an injurious explanation which deduces the final use from the immediate destination. What was the immediate destination of this vessel so equipped and furnished and fitted out? Why, it is not denied now that she was for the Confederate States, for one of the belligerents in this case.

Mr. Kemplay.—My learned friend ought not to say that.

The Queen's Advocate.—I will not say that it is not denied; but I will say that it is as plain as the mid-day sun, that that was the object for which the vessel was intended. Then, I say, that I claim the reasoning of my Lord Stowell, a better reasoning cannot be adopted; it is entitled to the highest weight in a court of justice, and more especially in a case of this description. You have bulwarks, you have stanchions, and you have hammocks, and you say, "Oh! but those may be found on board a yacht," because it is always to be remembered that the evidence in this case does not carry it beyond that. Captain

Inglefield's evidence, which everybody admits is "*omni ex-ceptione major*," is that those things might be used for a yacht. Does anybody believe that the vessel was intended for a yacht? or that anybody was hiring a yacht for the Confederate States in this case? It was for a belligerent use. I will admit, for the sake of the argument, that the equipments might have been *ancipitis usus*, and might possibly have been fitted for a merchant vessel, though there is no evidence of that; but for the sake of the argument, I will admit that it is possible that this particular article of equipment might have been fitted either for a man-of-war or for a merchant ship; and then, I say, that you must look to the destination in order to ascertain for what it was intended; and is not that position in exact harmony with the Act? Are not the words "with intent or in order that?" Have you not to consider throughout *quo animo* and *quo intuitu* this was done, and to look at the consequences for a moment of any other construction? It is quite clear that these vessels may now be so constructed (it is matter of general notoriety) that, without being pierced even with portholes, their bulwarks may be so built that swivel guns may be put upon them, and they may be a most effectual instrument of destruction of belligerent ships. And then, getting rid of my learned friend Sir Hugh Cairn's most ingenious suggestion, that there must be an intervening space between the boundary line of three miles from the shore and the putting on board of those guns, just conceive the facility of evading and eluding every provision of the Act. You send this ship out equipped, if you like it, in a manner which possibly would suit a merchant ship; you send swivel guns out from the same port three miles off, or in the little intervening space, if you like it, though I do not understand that argument, and you put them on board, and does any reasonable person mean to say that the belligerent Government would not have just ground of complaint against the neutral Government; and (to use Mr. Justice Story's emphatic and burning words) that the neutral Government was not guilty of a fraudulent neutrality, and that of which no foreign nation could be the dupe.

Now, my Lords, as to the words "furnish" and "fit out," your Lordships will remember the explanation which my learned friend the Attorney General put upon them. It is perfectly clear that all the words are susceptible of different significations. The effect of the word "arming" does not occur in this case. But I will say one word, with your Lordships' permission, upon the argument which is derived from the 8th section of this Act, what I may call the argumenting section, the section which refers to a vessel of war coming into a port, and some augmentation taking place.

*Mr. Baron Bramwell.*—Suppose that any furnishing of a ship, however pacific her equipment might be, it being intended that she should be armed when she got out of the territory of the neutral, was said to be a fraudulent neutrality according to the

ARGUMENT.

6th Day.

language of Mr. Justice Story ; and suppose it was true that any supplying of a ship, or furnishing, or equipping of her, however peaceful, was within the Foreign Enlistment Act, why might not similar language be applied to the case of a builder, having put the ship together, taking her to pieces, and sending out the pieces to be put together abroad. Why might it not be said, This is a fraudulent neutrality, because you have only to go to the Azores, and the different pieces of this vessel may be taken out and put together, and then it may be said that you do not send a ship out ? It is very difficult to draw the line.

*The Queen's Advocate.*—I should have thought, my Lord, that that was a very strong illustration of the practical difference.

*Mr. Baron Bramwell.*—There is a very strong illustration of the practical difference between a ship in a condition of offence and one in no condition of offence.

*The Queen's Advocate.*—If the Act had said that you shall wait before the ship is in a condition of offence, that argument would be applicable, but the whole of the Act is the exact contrary.

*Mr. Baron Bramwell.*—What I really meant was this : without expressing any opinion, which I certainly shall not do till the proper time arrives for doing so, one cannot help seeing this, that if the case is to be argued upon principle, one side may be arguing it as you are arguing it, " Why this is only doing the " same thing in effect as that which you know is prohibited, but " doing it by a subterfuge, and a shift, and an evasion." On the other hand, it may be argued " If therefore you would " prohibit this, which is a shift and a subterfuge, why should " you not prohibit the next step, which will be a shift and a " subterfuge, and then why not prohibit the next step, and so " on, and where are you to draw the line ? " I do not say that there is not a more marked distinction between a ship in a condition to receive an armament, and the pieces of a ship in a condition to become one ; there may be a more marked distinction between the first two things than there is between the latter two ; but still it is a very difficult subject to handle, with great respect to those who have been so warm upon this subject. With very great respect to those who have been so eager in their denunciations of the unfairness of this country in the matter, they will find it extremely difficult to stop when they say that nothing shall be done which is in substance the same thing as that which ought not to be done.

*The Queen's Advocate.*—I am sure that if your Lordship were in the condition of a belligerent state, you would see a great practical difference.

*Mr. Baron Bramwell.*—I should be very angry ; there is no doubt about that.

*The Queen's Advocate.*—You would see a great practical difference between portions of timber sent out to be put together in a foreign country, and a ship sent out able to do a great deal of mis-

chief, and able to take all her own guns on board three miles out. There is no saying how she might be constructed, and how she might be built. She might be built so as to run down the first belligerent ship she met.

ARGUMENT.

6th Day.

*Mr. Baron Bramwell.*—I dare say that the "Great Eastern," with a most innocent equipment on board, would be a most formidable antagonist.

*The Queen's Advocate.*—My Lords, I was going to say one word on the argument used upon the 8th section and the use of the words there, "equipment for war." My Lords, it only shows in what very different lights the same passages may strike persons who are bound, perhaps, to take different views of the case; but if I had been asked what portion of the Act I should most rely upon for showing that the word "equipment" in the other section was not necessarily a warlike equipment, I should have found that portion of it in this section. Because what is said here? The state has nothing to do with the vessel which comes in; the state cannot be guilty in any way whatever where a man-of-war or a privateer comes into her port ready equipped and furnished and fitted out for war; and according to the common law of humanity, which is part of the law of nations, she permits a vessel of that kind to do the necessary repairs, and to take food and water, and so on, on board. But if she added anything to her equipment of war, she would then be placing herself under a responsibility towards foreign states, and then the mischief in this case of the 8th section, so to speak, is supposed to be done. It is supposed not that the state can step in to prevent this vessel which has come into her port from being equipped; the vessel comes in equipped, and therefore all that she can do to maintain her neutrality honourably and fairly towards other nations is to say that she shall get no addition to her warlike equipment in this port. And, my Lords, upon all principles of construction of a statute, the fact of the words "equipment for war" being in the one section, and the words "for war" not being in the other, would go a very long way towards supporting my argument. I am sure, without wearying your Lordships, that innumerable cases might be found where a word being used with a particular epithet attached to it, giving it a distinctive character in one section, and in another section without that distinctive character, it has been argued that the Legislature intended a different meaning in the two sections.

My Lords, these are the observations which, I hope not at undue length, I have thought it my duty, regard being had to the position which I have had the honour to fill, to address to your Lordships. And, my Lords, in conclusion, I may be permitted, I think, to ask your Lordships to consider carefully one criterion for the construction of the statute to which I have not yet adverted. It is true that this is an English statute, as it has been said, and is to be construed by an English Court upon English principles. One would be very sorry to find that those

ARGUMENT.  
—  
6th Day.  
—

principles are at variance in any way with common sense, and with the spirit of all fair jurisprudence. I deem that not to be the case. I believe that nothing can be more equitable and more just than the English principles on this subject, for the English principles of the construction of statutes are derived in a great measure from the Roman law, in perfect accordance, as far as my researches go, with the rules for construction adopted in the codes of foreign jurisprudence. But if there be a criterion which ought to have more weight than another with a Court when there is a real honest doubt as to the meaning of the statute, it is that which is furnished by the consequences which result from the rival positions of the contending parties. Put the construction which my learned friends are contending for upon this statute, and we have their own admission of what the consequences would be,—a Federal Woolwich inland—a Confederate arsenal at Liverpool; bloodshed and rapine within three miles of our shores. How long do your Lordships think it would be possible for this country to maintain her neutrality in that state of things? Put the construction upon the Act which we contend for, and your Lordships will preserve to the Crown her power of maintaining neutrality with foreign states, will preserve to this country her honour among the family of nations, and will preserve to this people the inestimable blessings of peace.

*Mr. Locke.*—My Lords, I ought, perhaps, to apologize to your Lordships for addressing you after the very able, powerful, and learned speeches which have been made upon the subject; but my Lords, I consider it my duty if I can throw any light upon the matter, however small, or bring any fact before your Lordships of however minute a nature, which shall bear upon the question, as far as my ability will allow me, to state these matters for your Lordships' consideration.

Now, my Lords, I shall not go at length into the case, but I may perhaps be allowed shortly to remind your Lordships of the position in which it stands. My Lords, it is quite obvious and clear that there was an intention to fit out this ship, there was an intention on the part of somebody to do so, and I think upon the evidence it will be shown that there is ample reason to believe that the purpose for which this ship was to be fitted out was ultimately to be a warlike purpose. My Lords, the evidence shows this clearly, that there were Messrs. Fraser, Trenholm and Company, a firm who were clearly in connection with the Confederate Government, and that that firm from time to time furnished the means of carrying out the objects of the Confederate Government. It is clearly shown that Messrs. Miller and Company, and likewise Messrs. Fawcett and Company, were in the employment of Messrs. Fraser, Trenholm and Company, in addition to others whose names appear upon the information, namely, Captain Bulloch, Captain Tessier, and Mr. Hamilton, whose name, however, does not appear there. They were all connected with the transaction, overlooking the ship from time to time, and upon these facts I think there can be no

doubt that this vessel was being fitted out for the Confederate States.

ARGUMENT.

6th Day.

Now, my learned friend Mr. Karlake asked who it was that the Crown charged in this information, or rather who it was that was pointed at by the evidence as the party directing this matter. My Lords, it appears clearly upon the evidence that whatever was done, or whatever was to be done, was done at the instigation of the Confederate States, through Messrs. Fraser, Trenholm and Company, who were the active agents of the Confederate States, employing other agents under them, for the purpose of carrying out the views of the Government of the Confederate States, in arming vessels against the United States, with whom they were at war, and with whom this country was at peace.

My Lords, a great deal has been said in the course of the argument upon what has taken place out of this Court, both in the House of Commons and amongst the public. Sir Hugh Cairns called the attention of the Court to those arguments which were used at a time when the public certainly knew very little about this question, and I am sure I am justified in making that observation, when I remember what has fallen from his Lordship. His Lordship is well acquainted with all subjects which can possibly form the subject of discussion, whatever they may relate to. Whatever science or whatever question of politics we may have to inquire into, there is no man in this country better acquainted with the subject than the Lord Chief Baron. But we have it from the Lord Chief Baron himself, that he is free to confess that his mind upon this particular subject was not at the time of the trial properly "equipped and fitted out;" and I believe that it was only on Saturday or Friday last that a question which the Lord Chief Baron had himself frequently put throughout the trial, and indeed throughout the whole of this inquiry, was answered, I will not say to the satisfaction of the Lord Chief Baron, because we have not been able to satisfy him in the conduct of this case as much as we should have desired; but the question which the Lord Chief Baron put was, "May a man not build a ship upon a contract and sell it to anybody that he likes?" That was the question put to my learned friend the late Attorney General upon the trial, and the Lord Chief Baron complains that the late Attorney General did not answer the question, and did not bring his mind to "equip" his Lordship's upon that question, and upon the rest of the case. Now, I believe, my Lords, as I was stating, it was only on Saturday or Friday last that his Lordship had the satisfaction of receiving an answer to that question, and then it was a qualified answer,—it was an answer given by the Attorney General, and the Attorney General, who, all must allow, has conducted this case with an ability which probably has never been surpassed, was obliged to give a qualified answer to the question, after having considered it as we all have done from the time when it was first put. The answer was, "Oh, certainly, a man may build a ship, and he may sell it to anybody,

ARGUMENT.

6th Day.

“ whether he be a belligerent or whether he be not ; but he must “ not do it with the intention which is declared to be illegal by “ the 7th section of the Foreign Enlistment Act.” Therefore, I think that the late Attorney General, seeing how fully that question has since been considered by everybody, is not to be so much blamed because he did not answer it off-hand ; and I am sure that his Lordship will bear me out when I say that Counsel conducting a case, particularly a case at *Nisi Prius*, are not anxious to have those disagreeable questions put to them by the Court, and particularly by a Judge of so much knowledge, so much research, and so much acuteness as the Lord Chief Baron, because, of course, not possessing the powers of the Lord Chief Baron, we, to use a vulgar expression, sometimes imagine that his Lordship is endeavouring to get us into a hole, and therefore I may perhaps be permitted on the part of the late Attorney General to say, that in my humble opinion, I do not think that the course which he adopted upon that occasion was a course which most of us would not likewise have adopted ; that is, not to get into an embroilment with a Judge of such powers as the Lord Chief Baron, but to confine himself to the purposes of the moment ; I will not say to postpone the truth to the purposes of the moment, but to confine himself to what was the question which he was then upon before the jury, and to reserve himself for that question without embarrassing himself with any other.

Now, my Lords, as I was stating, a great deal has been said in this Court, a great deal out of the Court, and a great deal in the House of Commons, and likewise in another place, namely, the House of Lords, with regard to this great question of the Foreign Enlistment Act. Now what was said. I heard said myself, over and over again, in the House of Commons, previously to what the Lord Chief Baron said here, and the Lord Chief Baron, no doubt, although Judges seldom read the newspapers, had read the debates in the House of Commons.

*Lord Chief Baron.*—Not on the bench.

*Mr. Locke.*—Then I am right in assuming that his Lordship had read those debates, and his Lordship, though a Judge, and holding the high position which he did, was not altogether ignorant of the opinions expressed by others in this sublunary world with respect to this question, and I think I shall not be contradicted by any one when I say that the general opinion throughout the country was this, they, never having read the Foreign Enlistment Act, (and certainly I do not blame them, considering the immense trouble that the study of this Act has occasioned to those who have been engaged in it,) came to precisely the same opinion as his Lordship, and it was this— if a man may sell gunpowder, if he may sell cannon balls, if he may sell muskets, if he may sell shells, or any other destructive weapon, why on earth may he not sell ships ? And if his Lordship will pardon me I would say, upon the point of his Lordship's charge being calculated to mislead the jury, that the question asked out of doors, “ as



" you may sell gunpowder, cannon balls, and shells, or any other destructive articles, why may you not sell an armed ship?" was the question which the Lord Chief Baron asked in this Court.

Now, my Lords, a good deal has been said here upon the subject of the inconvenience to the shipbuilders.

*Mr. Baron Bramwell.*—I really do not think that any one of the learned counsel for the defence did say that.

*Mr. Locke.*—On the trial, my Lord.

*Mr. Baron Bramwell.*—They did not say it in the argument, and I was very much struck with it.

*Mr. Locke.*—My Lord, it was on the trial I think that there was a long argument by Sir Hugh Cairns upon the question of *malum prohibitum* and *malum in se*.

*Sir Hugh Cairns.*—No.

*Mr. Locke.*—That Sir Hugh Cairns said that I am quite certain, for this reason, that I never could forget anything which fell from Sir Hugh Cairns, and there was a long argument upon the distinction between *malum prohibitum* and *malum in se*. That I recollect perfectly, and that argument was made use of with respect to shipbuilders, and it was urged in this way, that the shipbuilders were doing nothing whatever that was in itself wrong, and that therefore their case, it was argued, was a hard case to be interfered with by the Government.

But, my Lords, it appears to be an argument which by no possibility ought to have any weight in this court at any rate, because this is a court which deals in hardships, or rather deals with them, and I may call to your Lordships' attention an Act of Parliament called the Customs Consolidation Act, and I may remind your Lordships that if a man has a few pounds of tobacco on board his yacht which has come into port and he has not paid duty, that yacht is subject to be seized, and that from time to time yachts and other vessels where the owner is perfectly innocent are seized by the Customs when they have any contraband on board. And what is the reason alleged? That it is for the protection of the Customs. And therefore when gentlemen are building a man-of-war to go out, and on the part of the Confederates to fight against the Federals, and when probably the effect of that may be to bring this country into war with the Federal States, I do not think they have much to complain of where an embargo is placed upon a vessel under those circumstances, it being the ordinary course in this country where offences are committed in ships, or by ships, or through ships, that the first thing done is to seize the ship, and it is upon this principle that the seizure has been made upon this occasion.

But again, what particular hardship is there in that? Subsequently Messrs. Fawcett, Preston and Company put in a claim to this ship, and say that it is their own. But, my Lords, what would have been the inconvenience if they were acting honestly and rightly, or, at all events, if they did not intend to infringe

ARGUMENT.  
 6th Day.

the provisions of the Act of Parliament by fitting out this ship for the Confederates for the purpose of making war against the Federal states? What was more easy for them than at once to have given an explanation, and to have shown for what purpose this ship was fitted out? That is the ordinary case in the Customs. We do not hear any great outcry made when a ship of any individual which may have contraband on board is seized; for if a satisfactory explanation is made to the Commissioners of Customs the ship is immediately released. And I use those arguments, my Lords, because they arise out of the evidence in the case, and it is a strong feature to show what the intention of these people was, that when they had the opportunity of getting their ship entirely freed from the trammels of the law they did not avail themselves of that opportunity at all, but they come in at the last moment and put in a claim, and then they say, "We will endeavour as far as we can to get out of the meshes of this Act of Parliament, and show how it does not apply to us." My Lords, they have sailed as near the wind as they possibly could, but I think that they have sailed so near the wind that it will be taken out of their sails. They have made that endeavour, and now I come to the mode in which they have attempted to do it.

Now, my Lords, I shall take the argument of my learned friend Mr. Mellish. It would be ill-becoming in me to take the argument of my learned friend Sir Hugh Cairns, seeing that it has been taken to pieces, and that he cannot have an opportunity of putting it together again, and it has been commented upon throughout; but why I would take the argument of Mr. Mellish is this, because he puts the case on the part of the defendants as concisely, I think, as it can possibly be put; and if that definition which he has made of their case will not hold water, then it is perfectly clear that they have not evaded the provisions of the 7th section of the Act of Parliament, but, on the contrary, they are clearly within them.

I wish to call your Lordships' attention to the definition given by Mr. Mellish in the proceedings of Thursday, the 19th of November. *Vide page 254.* Mr. Mellish says, "Having had a little experience of the great skill of my learned friend the Attorney General, I know his great skill in remarking upon the different views which have been taken by the different counsel who are opposed to him; and therefore I say, that in presenting the view which I am about to present to your Lordships, I of course am not to be taken as in any degree abandoning or qualifying what has been previously said by my learned friends." Now that is very well for Mr. Mellish to say, but it will be for your Lordships to say whether, if Mr. Mellish be right, he does or he does not demolish any of his learned friends. But that is perfectly immaterial for the sake of the argument which I am endeavouring to address to your Lordships, because I put it that Mr. Mellish understands this case as well or indeed

better than anybody. Mr. Mellish understood it long before any of us thought about it, and Mr. Mellish puts it in this short and concise manner. He says, "But I venture to go to this extent, "that it is perfectly legal, under this Act of Parliament, for any "shipbuilder in this country to build a ship." Now, nobody can dispute that fact. Then it goes on, and this is a part of his speech which requires careful attention, "perfectly well knowing "that it is adapted for war, under a contract with one of two "belligerents; and to equip that ship, so far as is necessary to "enable it to sail away from this country, and to deliver it to "the belligerent either here or elsewhere in that unarmed state." Now, Mr. Mellish entirely leaves out in that the intent with which it is built; the guilty intent which is alleged in the Act of Parliament, and which creates the offence. But there is another word which he has left out, and it comes between "ship" and "so." I think he should have introduced, in order to have met the facts of this case, the word "only," so that it would have read "only so far as is necessary to enable it to sail away from "this country;" because unless he puts in the words "only so "far," he does not meet this case, and for this reason, that all our evidence (if we are upon the question of a warlike equipment), and it was a mass of evidence, went to show that there was more done to this ship than was only necessary to enable it to sail away from this country.

Now, my Lords, what was done to this ship? What was necessary to enable that ship to sail away from this country? *Sail* she would not, because she would steam. Was it necessary to have her bulwarks made of a particular description? Was it necessary that stanchions should be fixed to the side of that vessel in which to put the hammock nettings? Was it necessary, in order to enable an ordinary ship to sail away from this country, that she should have an extraordinary rudder. And therefore I say that Mr. Mellish's position is untenable, because upon the question of armed equipment with regard to this ship more was done to it than was necessary to enable it to sail away from this country. With regard to the ship being built under a contract, I dare say this ship was built under a contract; and if the defendants had chosen they might have produced that contract, and if they had produced a contract to show that the ship was built for the Emperor of Japan, or the Emperor of China, or any person of that description, no doubt it would have gone a long way to show that this was an innocent undertaking. But whether it is by a contract, or whether it is not, does not appear to me, my Lords, to alter the case at all. The question is, Who was it built for? If it was built under a contract for any of the illegal purposes alleged in the 7th section of the Foreign Enlistment Act, then the ship would be clearly forfeitable. Mr. Mellish continues, "and to equip that ship, so far as is necessary, "to enable it to sail away from this country and to deliver it "to the belligerent either here or elsewhere in that un-

ARGUMENT.

6th Day.

ARGUMENT. "armed state." Now, my Lord, whether a shipbuilder might do that would depend upon what the intention was, and it appears to me that Mr. Mellish puts it upon the very ground upon which his Lordship put it at the trial. May you not do that particular thing Mr. Mellish says. Mr. Mellish upholds his Lordship's ruling at the trial, and contends that that is right and legal. I submit, in the first place, my Lord, that the mode in which Mr. Mellish puts it is not a true statement in the first place of what was the condition of that ship; but that if there be the intent, even the state in which Mr. Mellish says the ship was, is not a state which would make the ship not liable to be seized. My Lord, it is quite clear with respect to the fittings out, that there was to some extent a warlike equipment of that ship. It certainly was not completed. But, my Lord, if to any extent there was a warlike equipment, where is the line to be drawn? because if it is to be a complete equipment, a man might build a ship and put in every portion of the armament except one gun; it would not be completed. And therefore I must say, that I think that way of putting it, namely, the ship not being completed, is one of the most futile arguments that possibly could be adduced; because if the question turned upon the thing being completed or not completed, it would be the most simple thing always to carry out the work of the ship to a certain extent and not quite complete it. But the question arises, Is it completed sufficiently to show the purpose with regard to warlike equipment? It is a vessel with bulwarks belonging to a man-of-war, and I would call your Lordship's attention (which has not been drawn to the point in the course of this argument, showing cause against the rule), to the picture of the ship, the photograph which was put in evidence on the trial, and I think it would save the Court an immense deal of trouble if they would only look at that, because you might as well say that you would look upon the picture of an elephant, and take it for a horse, as that you would look at a photograph of this ship and take it for a merchant ship. If any body has ever seen a gun-boat, this was a gun-boat in every sense of the word. It has every appearance of a gun-boat. But in addition to that, there was evidence as to its component parts; how they were made up, how the ship was built, what was the nature of its bulwarks, what was the nature of its rudder, and above all as to its having those stanchions put up for hammock nettings, which hammock nettings act as a shield for the ship.

*[The Court adjourned for a short time.]*

*Mr. Locke.*—I was saying, my Lord, that whether or not the ship were completed is perfectly immaterial. The question is, What indications, with regard to whether there was any warlike equipment or not, were there upon that vessel to show that she was intended for a vessel of war—and I call your Lordship's attention to the evidence with respect to the hammock racks and

stanchions—and, my Lord, those hammock racks and stanchions would act as a shield for that vessel. Now certainly we have arrived at a time when the use of gunpowder has done away with the necessity of using the ordinary shield in battle by land, but I think it would never be contended that if in olden times a maker of armour had supplied a shield he would not have been supplying a warlike equipment. Now, therefore, if those stanchions were put up with a view of placing upon them the hammock racks, and if, as we have it in evidence, those hammock racks are used in vessels of war for the purpose of protecting the men against the shot of the enemy, they are certainly, as far as they go, most clearly a warlike equipment. But, my Lord, as has been observed, to show that this vessel was being fitted out for the purposes of war—

ARGUMENT.

6th Day.

*Lord Chief Baron.*—If you are contending against the argument of Mr. Mellish, which I collect you to be from the continuity of your sentences, let me point out to you that Mr. Mellish expressly says that it was a ship of war—he avows it to be a ship of war, and says it is perfectly lawful to fit out a vessel of war. His argument is, that you must not send it away in a condition to be used as a vessel of war.

*Mr. Locke.*—I will call your Lordships' attention to page 18, where Mr. Mellish lays down his proposition that it is lawful for a shipbuilder to equip a vessel in the way he there states, "and to deliver it to the belligerent either here or elsewhere in that unarmed state;" and therefore I presume, my Lord, that he assumes that to make it lawful to fit out the vessel in the way to which he refers, it must be entirely in an unarmed state.

*Lord Chief Baron.*—Oh, dear, no. I do not imagine that is his argument at all.

*Mr. Locke.*—What I understand him to say is this. In point of fact you may build the hull and deliver that to either of the belligerents in an unarmed state. But what I am contending for is, that that was not the case with this vessel at all; it was not a mere hull, and it was not delivered to the belligerent, and would not have been delivered to the belligerent, even as far as it had then gone, in an unarmed state, inasmuch as it had those stanchions placed for the hammock nettings, which were, in point of fact, an equipment for war. With regard to the hammock nettings, I submit that they were to act as a shield against the enemy. A shield to be used on land would be a warlike equipment, and I should assume that a shield to a ship would have a similar signification. But, my Lord, in addition to that there was the cooking apparatus.

*Lord Chief Baron.*—If a Roman soldier, for instance, went into battle with a shield only, without a sword, you would hardly say that he was armed.

*Mr. Locke.*—He is armed against the enemy certainly. He is armed with the shield; and if it were not for the shield, he would probably have a javelin through his body. I cannot

**ARGUMENT.** recollect the precise quotation, but I am sure in Homer, where Achilles put on his armour——

**6th Day.**

*Lord Chief Baron.*—He added an offensive weapon to all that.

*Mr. Locke.*—He did. But suppose he had not had time to get an offensive weapon, nobody can contend that he would not have been partly armed; he would have put on as much armour as he could under the circumstances. All I contend for is this, that a shield is part of the armour, and that the stanchions and the hammock racks are part of the armour.

*Lord Chief Baron.*—It has several times been observed that privileges which are given under particular statutes are meant as a shield and not as a sword; you, no doubt, remember the use of that expression.

*Mr. Locke.*—Yes, my Lord. When we bear in mind what we arm our ships with now, this is certainly a mild sort of shield, because, I presume, it could only be effectual against rifle-shot. But what do we call the shield we put upon the new vessels of war? It is called "armour plating," that is, the shield to preserve the ship; and would any body say that with that armour plating the "Warrior" was not armed? I conceive that anything that is done to the ship which enables it to act as a man-of-war——

*Lord Chief Baron.*—That turns upon a mere question of terms, what we call "armour" and what we call offensive "weapons."

*Mr. Locke.*—Yes, my Lord.

*Lord Chief Baron.*—A shield may be in one sense armour, but certainly it is not a weapon of attack. Long ago I received a good bit of philosophical advice, which was this: Where you have any discussion going on, find out whether it is really a question of some foundation or principle, or whether it merely means by what name you shall call something, for the moment you find it a question as to the meaning of terms, you had better give it up and look at a dictionary.

*Mr. Locke.*—When we look, it does not always give us the exact definition we want; and dictionaries vary——

*Lord Chief Baron.*—Very much.

*Mr. Locke.*—At different times; and we must take a dictionary of our own times. Probably a dictionary ages ago, when they had no guns to use, would not much help us.

*Lord Chief Baron.*—The meaning of words alter altogether; formerly "to let" meant "to hinder," now it means "to permit;" formerly the word "prevent" meant "to go before and assist," now it means "to go before and hinder."

*Mr. Locke.*—With regard to this—it is for your Lordships to put what construction you like upon it—it appears to me that putting a shield to a ship, such as the armour plating that the "Warrior" or any of those vessels has, would be arming it to a certain extent. Then, with regard to the cooking apparatus, that was provided for a number of men that could not by any possibility be required

on board any vessel but a vessel of war. It was for 150 or 200 men; that was stated in evidence not to have been necessary for any merchant ship, nor for any yacht, but only for a vessel of war. Besides that I should call to your Lordships' attention that the bulwarks were of a particular height, different from that of any merchant vessel; and if I recollect rightly, those guns that were being manufactured were of such a height as to fire over these bulwarks. It was not distinctly shown that the guns had a number on them for the vessel; but this was clearly shown that at the very same moment and in the same place that they were making the machinery for the ship, they were making the guns, as we assumed, for the ship likewise. Now, my Lord, the machinery was made and put on board; the guns were not intended to be put on board there, they were sent up to London, and, as we assumed, they were to be sent on afterwards and put on board the ship.

But, my Lords, I would contend that an armed equipment is not at all necessary. I will not go into that question at any length, but if your Lordship would allow me (and your Lordship has thrown out that you would pay attention to anything said by any one that might throw any light upon this question), I would call your Lordships' attention to the case which I mentioned before, namely, the case of Granatelli, which was tried in the Central Criminal Court, on Thursday, July the 5th, Friday, July the 6th, and Saturday, July the 7th, in the year 1849. Now, my Lord, with respect to that case, in the first place, I believe your Lordships would call this clearly an authentic report, it is the shorthand writer's note of the case at the Central Criminal Court, and it is contained in a book in which all those reports are bound up, and probably your Lordship has it—or perhaps your Lordship has not preserved it—as Mr. Baron Channell said they were sent to all the Judges.

*Mr. Baron Channell.*—The Judges on the bench at that date would have a copy of it.

*Mr. Locke.*—There was present the Right Honourable the Lord Mayor, Mr. Justice Coltman, Mr. Justice Maule, Sir John Key, and other aldermen. Mr. Justice Coltman and Mr. Justice Maule were the two Judges present at the Central Criminal Court on that occasion, and I should mention who the counsel in the case were, more especially after what fell from your Lordship with respect to Mr. Baron Martin, because he was a counsel in the case. The statement of that case is this: "Franco Mac-cagnone Granatelli, commonly called Prince Granatelli, Lewis Scalia, and John Moody were indicted (together with Salvatore D'Amico, who did not surrender) for unlawfully, and without the leave of Her Majesty, equipping, fitting out, and furnishing a certain vessel, called the 'Bombay,' with intent to commit hostilities against the King of the Two Sicilies. Other counts for a conspiracy, and varying the manner of stating the charge." That is all that the note gives of the case apart

ARGUMENT.

6th Day.

ARGUMENT.  
6th Day.

from the evidence. Sir Frederick Thesiger, with Mr. Clarkson and Mr. Bodkin, conducted the prosecution; Mr. Baron Martin defended Scalia. This report gives the cross-examination, but it does not say who the counsel appeared for, but we can collect that from the evidence.

*Mr. Baron Channell.*—My brother Martin and Sir FitzRoy Kelly were both counsel against the Crown.

*Mr. Locke.*—I think Sir FitzRoy Kelly counsel for Prince Granatelli. I do not know whether Mr. Baron Martin was for Scalia or not, but Mr. Montague Chambers defended the other defendant, Moody. The case occupied three days; it was most fully gone into certainly, and in the result there was a verdict of Not guilty; but I must call your Lordships' attention, as has been done with regard to other matters in this case, to the state of public opinion at that time.

*Lord Chief Baron.*—You had better not refer to that all. I must appeal to you to assist in the administration of justice by not making reference to such matters. What have we to do in this case with public opinion now, or at any other time?

*Mr. Locke.*—I will tell you. This was a prosecution in the year 1849, not instituted by the Crown. Immediately following the French Revolution of 1848 there was a rising in Sicily against the Neapolitan Government, and your Lordship, I am sure, will bear in mind that at that time there was a strong feeling in this country, and which, I believe, continued down to the time of Garibaldi, very much in favour of the Sicilians.

*Lord Chief Baron.*—In favour of every resistance to oppression all over the world, wherever occurring.

*Mr. Locke.*—Yes, certainly. Seeing that this was not a Government prosecution, that it was a prosecution instituted by the Neapolitan Government themselves, upon which their Ambassador was examined in the Court, it is not extraordinary that there should have been a verdict of Not guilty; but, my Lord, I mention the case as showing that this precise question arose in it.

*Mr. Baron Channell.*—What the Lord Chief Baron stated the other day is in accordance with the modern practice. For the despatch of business one Judge sits in one Court and another Judge in a separate Court. When a case of any considerable importance comes on it is not unusual for the Judge to request his brother Judge to sit with him. On those occasions it is customary for each judge to take part in any question of law which may arise. In the case you are referring to, Mr. Justice Maule presided with Mr. Justice Coltman in the way I have supposed, as one of the Judges attending to the case.

*Mr. Locke.*—I have no doubt that was so in a case of this description which lasted three days, and where for the first time—

*Mr. Baron Pigott.*—Unless you can give us the direction of the learned Judge, it is not of much use referring to the case.



*Mr. Locke.*—I am about to do so. It has been assumed that this is the first time that this question has come before a court of justice. Precisely the same question came before the Central Criminal Court in that case, with this exception, that was an indictment, but it did not make any difference with respect to the point of law as to equipment. It was an indictment against those parties for equipping the vessel the "Bombay," for the Sicilians to act against the Neapolitans, who were at peace with us at that time, therefore that is precisely the same case. I will first call your Lordships' attention to this, that Sir FitzRoy Kelly, in addressing the jury, said, "The prosecution was not by the Government, but by " a foreign prince to punish his own subjects." That was Sir FitzRoy Kelly's argument, and certainly a very strong one to an English jury. Then he went on, on the point of law, to argue " that the vessel could not be considered to be equipped until fully " provided with men and arms." Mr. Justice Coltman then said, " He did not go along with the learned counsel; the Act of " Parliament expressly made a distinction between fitting out " and arming." Now, my Lord, that certainly, if it could be taken as a decision, goes a long way to explain the seventh section of the Foreign Enlistment Act; at all events it disposes of the question which has been very often mooted and very much discussed before your Lordships, whether, in the first place, fitting out and arming were not the same thing; and whether, in point of fact, if there were a fitting out, it must not be an armed one. But it appears to me that Mr. Justice Coltman lays it down, that fitting out a vessel and arming a vessel are two distinct things. I will read such parts of his summing up as bear upon this; he says, "There are three separate charges in the indictment" —

ARGUMENT.

6th Day.

*Mr. Baron Channell.*—What you are reading from is not the full transcript, as I understand you.

*Mr. Locke.*—No, my Lord.

*Mr. Baron Channell.*—The corporation employed a shorthand writer, whose report, as I understand, you are reading.

*Mr. Locke.*—This is not from the corporation report; this is from what I have obtained from the "Times" newspaper, but I use it, after what fell from the Lord Chief Baron the other day. He said he could consult Mr. Baron Martin upon this question, Mr. Baron Martin having been engaged in this case. If what I state now from the report in the "Times" should be incorrect, there is no doubt that Mr. Baron Martin would set it right.

*Lord Chief Baron.*—Mr. Baron Martin is not here,

*Mr. Locke.*—No; but your Lordship stated the other day that you could confer with him.

*Lord Chief Baron.*—The only way in which such materials could be usefully presented to the Court as an authority would be by the learned Judge who was then a counsel in the case, refreshing his memory and telling the Court what he considered was the decision in that case, if there was any.

ARGUMENT.  
 6th Day.

*Mr. Locke.*—Perhaps your Lordship will allow him to refresh his memory from this statement,

*Lord Chief Baron.*—What I said was this,—send the materials to Mr. Baron Martin, because it is in vain to present them to us; we know nothing about it, and you can hardly suppose that we shall communicate with Mr. Baron Martin, putting him in possession of those materials, and asking him to form an opinion upon them.

*Mr. Locke.*—"There were three separate charges in the indictment, first, enlisting sailors; second, enlisting soldiers; and third" (which is the most important), "fitting out a vessel with the intent to employ it for warlike purposes against the King of Naples. A good deal had been said with regard to the intention of the Act of Parliament, but at present he should tell them that if they were satisfied that the vessel was fitted out for the purpose of committing hostilities against the Neapolitans, and that the object was so far carried out as that by putting the armament on board"—

*Lord Chief Baron.*—You are now only reading from the "Times" newspaper. It is the first time such a thing has been attempted in this Court.

*Mr. Locke.*—There are only three more lines, my Lord.

*Mr. Baron Bramwell.*—I think it very objectionable. If that is to be read, every newspaper report is equally entitled to be read in a court of justice.

*Mr. Locke.*—I have endeavoured to get the shorthand writer's note, but unfortunately I have not been able.

*Lord Chief Baron.*—You see it is not because you have endeavoured to get what is good, that therefore we are to put up with something that is not good.

*Mr. Locke.*—Then I will use this as my own argument. "If the object was so far carried out as that by putting the armament on board she would have been ready to go into action, that would be quite sufficient."

*Lord Chief Baron.*—What you are doing is this, you are insinuating to us that that was what the learned Judge ruled; that is the object of using that argument. It is really doing the same thing that you object to as having been done in the case of the "Alexandra," that is, pretending to do one thing and doing another.

*Mr. Locke.*—I understood your Lordship this morning to say that any opinion expressed in clear language that might throw light upon this subject would be welcomed by your Lordship, from whatever source; and I am certain your Lordship has throughout the whole of this case relaxed the strict rules with regard to arguing cases of this description.

*Mr. Baron Bramwell.*—That is like saying, that my Lord has done what is wrong, as I understand.

*Mr. Locke.*—A question certainly arose in the first instance, whether what was said in Parliament should be used, and it

was used; but, however, I will not dwell further upon the subject, I was only anxious to call to your Lordships' attention to the opinion of a learned Judge, who had the question before him for the first time, and who was assisted by Mr. Justice Maule.

ARGUMENT.

6th Day.

Now, my Lord, I will refer to that book of Mr. Gibbs, of which your Lordship has spoken so favourably, and your Lordships will find him, after fully considering the question——

*Lord Chief Baron.*—Are you proposing to give his opinion?

*Mr. Locke.*—I mean merely to quote what he says with regard to equipment.

*Lord Chief Baron.*—You can hardly quote that.

*Mr. Locke.*—Very well, my Lord. Then I will call one matter to your Lordship's attention, with respect to the course that has been pursued in these matters by the American Government; and perhaps I should be allowed to read from Mr. Gibbs' book, not his opinion, but an extract from a senate document of the 1st and 2nd sessions, 34th Congress, page 238. Now, my Lord, that relates to a vessel called the "Maury," and brings us down to the year 1855, during the Crimean war, and I use it to show the course that is pursued in the United States, and also to show that if the defendants in this case had chosen to act openly in the first instance, and had explained what their object was, and had shown that that object was an innocent one, the vessel would, of course, have been at once released. Now, this was the seizure of the "Maury," in the year 1855, by the American Government, on the information of Mr. Crampton, the English minister. He stated that he had reason to believe that she was being fitted out for the Russian service, and that other vessels were in progress, intended to intercept the mails between Liverpool and Boston. It appears that the "Maury" had on board at the time 14 guns, muskets, side arms, ammunition, and timber. In that case the vessel, at all events, was libelled, and was placed in charge of the marshal (I use this to show that the vessel in that case was actually seized); but upon an explanation being given, the vessel was set at liberty with the full sanction of the English consul. Now, my Lord, if they had chosen to give an explanation in the present case, a similar result might have followed if the purpose had been an innocent one, therefore we have a right to assume that no such explanation could have been given.

I should like, before I sit down, to make one or two observations with regard to the summing up of the learned Lord Chief Baron, and that only with respect to what has fallen from his Lordship in the course of this argument, namely, that he had no information given him in this case with reference to what was the question which was to be decided.

*Lord Chief Baron.*—I did not say no information was given about the matter at all.

*Mr. Locke.*—No information as to what the point was upon

ARGUMENT.

6th Day.

which the counsel for the Crown would rely in the explanation of the Foreign Enlistment Act. Now, my Lord, I wish to refer your Lordship to what fell from the late Attorney General in opening this case.

*Lord Chief Baron.*—To what page are you referring?

*Mr. Locke.*—I will refer your Lordship, in the first place, to page 5, where the learned Attorney General states to the jury what this information is; that it is a proceeding for forfeiture; and he then cites the Act of Parliament, and then describes all the persons who are connected with the transaction; and he states what the object of the Act of Parliament is, namely, to enforce the observance of neutrality in the event of war between states with each of whom this country might happen to be in friendly relations. He clearly states the object of the Act of Parliament, namely, for the purpose of enforcing upon the subjects of this country that neutrality which is for the benefit of the common weal of the nation. He then goes on to describe what had been done with respect to this vessel. He then says at page 11, "I think you will find that the vessel, as a hull, is complete. The masts are in, and were in at the time of the seizure, because the vessel has very properly remained from that time to the present in the state in which she was found at the time of the seizure. The hull is complete, the masts are in, the rigging appears to have been, I think, from that photograph, commenced, and the boiler, for it was a screw steamer, a screw propeller, the screw was in, and the boiler was in, but I think the fittings of the boiler were not complete. At all events, gentlemen, the vessel had proceeded so far that there seemed to be, and I believe there was, no difficulty whatever in determining that the destination of the vessel, in whatever quarter of the world it was intended she should be employed, was a warlike destination. Now, gentlemen, that brings me to the next step in these proceedings. The seizure having been made, it then became the duty of the Attorney General to file an information, that is to say, to make a certain statement, in proper form, of the grounds upon which the seizure had taken place, and upon which the legality and justice of the seizure was intended to be rested, and which were to be relied on to warrant the forfeiture which is sought in the present proceedings. That information is based on the section to which I will direct my Lord's attention rather than yours, the 7th section of the Foreign Enlistment Act. *The Lord Chief Baron.*—I have read it just now. *The Attorney General.*—The information, as my Lord knows, by this time is a very voluminous document. In truth, neither you, gentlemen, nor any one else, unless my learned friends on the other side think proper to embark in the affair, no one need trouble themselves about the lengthy information or the multitude of counts contained in the document. The number of counts, as my Lord will understand, is rendered necessary, or prudent at all events."

*Lord Chief Baron.*—What is the object of reading this?

*Mr. Locke.*—To show that the exact question was raised at the trial.

*Lord Chief Baron.*—Come at once to where that point arises. You need not tell us that the Attorney General told the jury that there were 90 odd counts, and only eight to which attention need be paid.

*Mr. Locke.*—It is part of the sentence to which I wish to call your attention. "The number of counts is rendered prudent, or necessary at all events, by the very numerous words of description of the violation of the statute which occur in the section on which it is rested."

*Lord Chief Baron.*—I believe we know by this time all the Act by heart.

*Mr. Locke.*—Yes; but what I am upon is, that that information which we all of us have now, was conveyed to your Lordship at the time of the trial by the late Attorney General.

*Lord Chief Baron.*—Nobody doubted that. I am not aware that anything has fallen from anybody expressing any doubt about it.

*Mr. Locke.*—I understood your Lordship not only to express doubt, but to state that there was no single proposition laid down by the late Attorney General by which your Lordship could understand what it was that the Crown intended to rely on.

*Lord Chief Baron.*—Nothing of the kind. You have totally misunderstood. I did not say no single proposition of any kind was laid down, but that the Attorney General did not state any distinct proposition of law apart from the matter that was before us, so as to enable us to determine what he took to be the real meaning of the Act. None of those distinctions that have been taken since were ever laid before the jury or me, and as I have observed again to-day, the Attorney General did not mention if there were any distinction between the words "equip," and "furnish," and "fit out." He did not say one syllable about it. That is what I have said to-day, and it is true. From beginning to end you will not find in the Attorney General's address to the jury a distinction drawn between one word and the other, so as to call their attention to what count they were to find the parties guilty of. The Attorney General said, Upon the facts, I shall prove, under the 7th section of the Foreign Enlistment Act, you ought to find the defendants guilty. That is a very distinct proposition, and there is no doubt he laid that down; but that gives no light as to what he considered to be the meaning of the Act.

*Mr. Locke.*—Then afterwards the Attorney General stated he should not merely rely upon the "equipping, furnishing, fitting out, or arming;" he stated that fitting out and furnishing were two distinct things.

*Lord Chief Baron.*—But he did not say how they differed from each other. Really, Mr. Locke, I think it would be better if you

ARGUMENT.

6th Day.

**ARGUMENT.** would apply your observations to the real subject-matter. I never said anything like what you ascribe to me. The Attorney General laid down no distinct proposition about the matter. No doubt he said the defendants were liable to be found guilty under the Foreign Enlistment Act, under the circumstances he would prove; but he took no distinction between one word and another, between one meaning of the Act and another meaning, and did not call the attention of the jury in any degree, in the way in which the present Attorney General called our attention the other day, to the meaning of the Act applied to various subjects.

6th Day.

*Mr. Locke.*—I think your Lordship will find that the late Attorney General laid down a distinction between equipping, furnishing, fitting out, and arming, and said that if either equipping, furnishing, or fitting out were proved, it was sufficient; and your Lordship will find he clearly laid down that he should rely upon the attempt to do any one of those things, and should call upon your Lordship to leave that question to the jury. Now, my Lords, certainly the learned Attorney General did not in his opening go on to distinguish between all those different things, equip, furnish, and fit out, but he stated to the jury that he should rely upon them; and, my Lord, the course taken by the learned Attorney General was, I think, the course which is usually adopted. A counsel does not say, I shall give up a certain portion of my case in opening it; he waits to see what the distinctions are which are taken by the other side, and then, when the other side have taken those distinctions, he deals with them. I think your Lordship will find that the late learned Attorney General in his reply applied himself to every one of those distinctions after they had been raised by Sir Hugh Cairns; and I may refer, as an exemplification of that, to what has occurred to-day. When my learned friend the Queen's Advocate was meeting the argument of Sir Hugh Cairns, your Lordship interposed and said, It is unnecessary that you should argue that point, that point was taken by the late Attorney General, and I ruled with him; I was of his opinion at the trial. That was his reply to Sir Hugh Cairns. But, my Lord, this question certainly was mooted by the Attorney General, and was relied upon by the Attorney General, that the attempt to commit any of those acts, if that was proved, would be sufficient to bring the parties within the Act.

*Lord Chief Baron.*—No one doubted that.

*Mr. Locke.*—That point, I submit, was not put to the jury by your Lordship in a way in which they could understand it.

*Lord Chief Baron.*—That you can say what you like about.

*Mr. Locke.*—And that is one of the grounds upon which this rule was obtained, namely, that the attempt to commit any of those acts was not put to the jury by your Lordship. I certainly have read through the summing up as carefully as I could, and I do not see in any part of it where that question was put to the jury; and if so, my Lord, I should submit that upon that ground

alone we should be entitled to a new trial. It will be unnecessary for me to go into all the arguments that were used throughout your Lordship's summing up; that has been done by the learned Attorney General and by those who have preceded me; but what I wish to call the attention of the Court to is, that those questions were raised by the counsel for the Crown in the case, that they were brought to your Lordship's attention, and that having been so brought to your Lordship's attention, they were not submitted to the jury, or not submitted to the jury in such a way as that the jury comprehended what were the issues left to them.

ARGUMENT.

6th Day.

My Lords, I submit in this case that the information which has been brought by the Attorney General has been clearly substantiated, that the defendants in this case have been clearly brought within the 7th section of the Foreign Enlistment Act, that they have been shown to have equipped, furnished, and fitted out the vessel up to a certain point, within which point are contained sufficient elements to show that it was a vessel fitted out for the purposes of war; I likewise submit that it is clearly shown—and about that there appears to be no contest now, I believe, in the case—that that vessel was fitted out for the Confederate States and to make war against the Federal States. At Liverpool, previously to the time at which these transactions were going on, vessels had been fitted out in the same way that the “Alabama” had been fitted out, and it was supposed, I presume, at the time that vessel was fitted out, that the mode in which the parties acted was not contrary to the provisions of the Act of Parliament. A similar attempt was made in the case of this vessel, but it was stopped, and the question is, whether, in point of fact, it can be said, Oh, you stopped it too soon, something more ought to have been done to the vessel to enable you legally to stop it and to seize the vessel. I submit, my Lords, that all the facts with reference to the vessel show what it was intended for. There is no question for whom the vessel was to be built; there is no question whatever as to the use it was to be put to; but it rests upon the narrow point raised by my learned friend Mr. Mellish—and that was why I was anxious particularly to call your attention to the position which he took, namely—whether what had been then done to the vessel could amount to an offence. With regard to the intent he says nothing; but the intent, as I should submit to your Lordships, governs the whole of the transaction in such a way as to make it utterly impossible for the defendants to say that they are not within the provisions of the statute.

My Lords, it is hardly necessary for me to repeat that this is a most important question for your Lordships' consideration; it is not merely an important question as regards this particular case, but it is an important question for this nation to know whether or not the Crown is to be that portion of the Constitution which is to declare whether or not there shall be

ARGUMENT.

6th Day.

war between this country and foreign states, or whether any man who chooses for his own purposes, and to put money into his own pocket, shall be at liberty to endanger the peace of this realm and to bring us in contact with foreign nations. That is the real question in this case, and, put in that light, it is a most important one. Viewed with reference to Messrs. Fawcett, Preston, and Company, as I have said before, I do not think that it is an important case at all. They have built this vessel for the Confederate States, and there is no doubt that as they have proceeded in building this vessel they have been remunerated for the expense they have been put to and for their labour. That, I believe, is the course which is always adopted, and therefore the question which your Lordships have to decide is a question of importance as an international question, and not a question of importance as regards those persons who are the defendants in this case.

*Mr. Jones.*—My Lord, I am on the same side, and I propose to offer your Lordships a few observations on the construction of this Act of Parliament, or rather of the 7th section of it. Although the remarks which have been made and the information which has been brought before your Lordships' attention has been very important, I need not say that the question really centres upon the construction of a few words of this section of the Act of Parliament. Your Lordships have, no doubt, been very materially assisted by the very able arguments which have been addressed to your Lordships. But, after all, those arguments have principally been addressed to your Lordships for the purpose of enabling you to put a construction upon the 7th section of the Act of Parliament.

Now, my Lords, I assume, for the purpose of my argument, that there was such an intention as is prohibited by the 7th section; and allowing this assumption, I say the questions arising on this rule resolve themselves into the single question, What is the meaning of these words in the information and in the Act of Parliament, "equip, furnish, and fit out?"

*Lord Chief Baron.*—I should say that the Act of Parliament is directed against certain acts, and then that the attempt, the endeavour, the aiding, and the assisting, are made penal as well as the act itself.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The Act of Parliament is directed against doing certain things at a certain place with a certain intent.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The place is some port in this country, the intent is (because the transports and storeships were given up at the trial) "to cruise or to commit hostilities."

*Mr. Jones.*—To be employed for the purpose of

*Lord Chief Baron.*—Then, the question is, What is the act? That depends upon what is the meaning of "to equip, to fit out, " or to furnish."



*Mr. Jones.*—That is precisely the way in which it struck my mind. ARGUMENT.

*Lord Chief Baron.*—And too much stress must not be laid upon any one part of it. You must not say that I prove the intent, and, therefore, whatever was done with that intent was unlawful, whether it was within the precise words of the Act or not, or whether it was meant to be done somewhere else. The crime that is created, the offence that is made by the Act of Parliament is doing certain matters in a port of this country with the intent to cruise or commit hostilities.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—Then, I apprehend, the only doubt that can exist is, What is the meaning of these words as applied to the subject, "to equip, to fit out, or to furnish."

*Mr. Jones.*—That is the way in which I ventured at the outset to present it to your Lordships, and that is the point to which, as I humbly observed, the matter must at last be brought round.

*Lord Chief Baron.*—The intent, without the act or the attempt to commit it, can be nothing.

*Mr. Baron Bramwell.*—You must not lose sight of the way in which the Attorney General put it, which I understood to be this: that if there is a thing with an intent that it shall be employed for the service of a foreign prince—

*Mr. Attorney General.*—I rely emphatically upon this, that the ship should be employed by a foreign prince to cruise, and not go straight from the equipment to cruise.

*Mr. Jones.*—I understood the Lord Chief Baron to mean that—in short, I was going to ask his Lordship to vary the expression if it did not mean that.

*Lord Chief Baron.*—I meant merely to point out that there are three matters necessary to constitute the offence. The offence may be either doing the thing or attempting to do it. But supposing, which perhaps may be the most convenient way to have a distinct notion, you limit it to the act itself.

*Mr. Jones.*—Say "equipped."

*Lord Chief Baron.*—Then there must be, 1st, an equipment, in a port of this country, and, 2nd, it must be with the intent denounced by the Act of Parliament.

*Mr. Jones.*—Precisely so. If I may say so, the offence must include the combination of these two elements, or, in other words, it is the combination of these two elements which constitutes the offence.

Now, my Lords, I have said that for the purpose of my argument I take for granted that the criminal intention is present. I proceed to enquire what is the equipping, furnishing, and fitting out forbidden by the section. I shall use the term equip as comprehending the words furnish or fit out. Now, looking merely to the Act of Parliament itself, and looking particularly to one of the sections of the Act of Parliament, namely the 8th section, (which has been appealed to by Sir Hugh Cairns as

ARGUMENT.

6th Day.

throwing a flood of light upon the Act,) for the purpose of interpreting the 7th section, I submit to your Lordships that this 8th section contemplates two species of possible equipments. It contemplates a species of equipment which it does not forbid, and it contemplates a species of equipment which it does forbid. Your Lordships will remember, without adverting again to the language of that clause, that the 8th section, addressing itself to the equipment of a pre-existing vessel in a neutral port, speaks of equipments for the sole purposes of war. I do not recollect whether that is the precise expression.

*Mr. Baron Channell.*—No, it is not.

*Mr. Jones.*—“Any equipment for war.” The precise expression is, any equipment for war. Now, my Lords, when the Act uses the expression “equipped” in the 7th section, your Lordships will notice that it does not use in that section the word “equipment” in that sense and with that specific distinction which it ascribes to “the equipment for war” which is contemplated by the 8th section; and for very good reasons, because it is very easy to understand how there may be an equipment for other than purposes of war before the vessel is brought into the condition of a ship of war, and how there may be an equipment for other than purposes of war after the vessel has been brought into the condition of a ship of war; but the equipment forbidden is that which is described as an “equipment for war.” The way in which I use that, and the manner in which I consider that that section does throw a flood of light upon the question, is, that inasmuch as you have by the words of that section an equipment described as an “equipment for war,” inasmuch as you have the term “equipment” used in the 7th section without any such limitation, you must see that the Legislature had in its contemplation two species of equipments; and the argument is clenched, if I may be permitted to say so, by the use in the 7th section of the disjunctive conjunction. When you see used in the 7th section “equip or arm,” and when you see used in the 8th section “equipment for war,” you have in effect in the 8th section an expansion of that expression “arm” in the 7th, and read by the light of the 8th section, the 7th section says, “If any one shall equip a ship for the purposes of navigation or for the purposes of war with the intention, &c., the ship shall be forfeited.” So that, the prohibited intention being present, the equipping for the purposes of navigation, which aids the execution of that intention, is as much forbidden as arming is. The term “arm,” as used in the 7th section, is in effect the same thing, or at all events part of the same thing, which is included in the expression “arm for the purposes of war,” used in the 8th. Now, my Lords, passing from the 8th section to the 7th section, if you look at the provision with respect to the equipment which is spoken of in the 7th section as the equipment of a transport, you will find that the equipment of a transport does not suppose an equipment for the purpose merely of navigation, as dis-

tinguished from an equipment which would enable the transport when equipped as contemplated by the Act to cruise or commit hostilities. The words "equip, furnish, and fit out" are applied not to a ship of war, or to a ship which is to cruise or commit hostilities, but they are applied to a ship which is not to cruise, which is not to commit hostilities, but which is to act as a transport or store ship. When, therefore, you have got the word equip for the purpose of a transport, in reality you have a distinctive application made of that term "equip" in the 7th section, as importing an equipment other than an equipment for a hostile purpose, or in a hostile fashion. And, my Lords, although it is true that the structure of the vessel, its capabilities, its adaptation to the purposes of war are very important to be considered when the intention is in question, yet if you grant the intention, there is no use whatever in inquiring as to whether or not the structure of the vessel is such as to make it capable of being adapted for the purposes of war. If, indeed, the structure were such as that it could not be used as a transport, for instance, or could not be used for a cruiser, or to commit hostilities, that would negative the intention; but granting the intention, which of course could not be granted unless the vessel were of a structure which would suit it, and the possibility of its being executed by the structure in question, the kind of structure is not material; the intention being present, the question really is, whether the words "equip, furnish, and fit out" can by possibility extend to anything more than an equipment for the purpose of navigation. I address to your Lordships those observations with reference merely to the words which are found in the Act. I cannot help thinking that when you find words in an Act of Parliament capable of being interpreted so as to make the whole Act consistent and intelligible, that is a far more valuable test than a discursive inquiry as to what the policy of the Act may be. If you can see that a word is used in one section which is consistent with its interpretation in a fixed sense in that section, and which is consistent with its interpretation in that sense in other sections of the Act (say, in one other section of the Act), it would require a great deal indeed to show you, either from conjecture, or from considerations of policy, or from any consideration except some absurdity or repugnancy, that it should not be accepted in that fixed sense, which I venture to call the natural sense.

I shall presently offer to your Lordships an observation or two with regard to the policy of the Act, but I dwell for a moment upon the observation that the quality of that "equip- ping, furnishing, and fitting out," is only material when the intention is in question. When the intention is in question you look to see whether or not the structure of the vessel is such, or the fittings of the vessel, so to speak, are such, as to reconcile and make the structure of the ship compatible with the existence of

ARGUMENT.

6th Day.

ARGUMENT.

6th Day.

the intention, and I insist that to say the equipment must be an equipment for purposes of war is to confound the quality of the equipment with the purpose of the equipment, and I insist that the objection that the equipment must be a warlike equipment, that is to say, an equipment for the purposes of war, is a disguised repetition of the objection that the ship must be armed besides being equipped.

Now, my Lords, granting that an equipment for the purposes of navigation is the equipment contemplated and prohibited by the Act, the next question is, What is an equipment for the purpose of navigation? or, otherwise expressed, What, again, is the meaning of these words, "equip, furnish, and fit out?" Of course they are not to be construed etymologically. The question is, whether they are compatible with the reasonable interpretation assigned to them. Now, my Lords, I do not think it is necessary for the purpose of this case or for the purpose of this argument to consider whether or not those words, "equip, furnish, or fit out," must be such or are such as relate exclusively to the structure of the vessel, or whether they must be ancillary to an existing vessel or ancillary to the structure of the vessel; I apprehend it is not necessary in any point of view, but I apprehend it is eminently not necessary here, because I should say if that question had to be considered, when you have the engines in the vessel, or partly in the vessel, surely that is a furnishing of an existing structure; when you have the cooking apparatus surely that is a fitting. But, however, it is not necessary for my purpose to consider that; it is sufficient for me to consider what is an equipment such as is contemplated by the Act.

Now, my Lords, I submit to your Lordships that any commencement of a vessel, present the intention, is an equipment forbidden by the Act. If the words are "flexible," and I thank my learned friend Mr. Mellish for the word, it is a very just word to be used; I should say, that if, looking at the meaning of the word as it occurs in the 7th and in the 8th sections, and treating it as flexible, if there be any doubt about it, the only way of explaining it is to regard the policy of the Act itself. Now, has any reasonable policy been suggested other than that which has been stated on our side already, namely, that the policy of the Act was to prevent this country from being made a station of hostilities? I am quite aware that it is suggested as a policy of the Act to prevent what Sir Hugh Cairns calls proximate acts of hostility; but as to that being the sole policy of the Act, is there anything in the Act, or in the history of the Act, or in pre-existing events, which confines it to that policy? Of course, the larger the policy the better for the argument for the Crown; but I ask, Is there anything whatever in the Act which excludes the notion of its being so applied as to prevent our soil from being made a station for hostilities?

*Mr. Baron Pigott.*—You mean the starting point ?

*Mr. Jones.*—Call it what you will, I call it the cradle for hostilities.

*Lord Chief Baron.*—Call it what it is.

*Mr. Jones.*—Allow me to ask whether it was not intended to prohibit this country from being made the cradle of a naval armament, for such it would be if you allow a ship to be formed. I apprehend that if the object of the Act be to prevent any ship being built or made here on our soil, I will not say being made or built here alone ; but I say, if the object and the policy of the Act be to prevent our country from being made the fulcrum, if you will, or, if I may revert to my illustration, a cradle, in which you may lay the infant navy ; unless, I say, you can reasonably show that the purpose of the Act is something else, or unless you can advance something to show that the object of the Act is not such ; unless you can furnish a better argument than seems to have been advanced, or unless you can find some fault in the argument, that the most reasonable construction from all history and from the language of the Act, not forgetting the preamble, is to prevent that which will be the cause of irritation to belligerent nations——

*Mr. Baron Channell.*—Not “ *will be* ; ” it is a very important observation : it is “ *may be* . ”

*Mr. Jones.*—What is likely to be, that is. I say, unless you can destroy—and this is really the pinch of the matter—unless you can suppose some policy to be in the contemplation of the Legislature other than that which we assign to it, namely, that the object of the Act was to prevent that irritation which not only may be, but which we know is, and which, appealing even to contemporaneous events, we see is the cause of irritation, and which, if you were to go back to the history of the times in which this Act was passed, was known to be the cause of irritation ; unless, I say, you can destroy that argument, and the probability and the presumption arising from the language of the preamble, and arising from the provisions of the Act, and arising from what I venture to call the antecedent probability, what is there to affect the argument arising out of this policy ? The Act must have had some policy ; that policy, so far as it is possible to glean it from the words of the Act itself, is consistent with the policy which I assign to it ; for may it not, and does not the lending of the use of the soil by a neutral to one of two belligerents (to use the language of the Act) “ tend to “ endanger the peace and welfare of this kingdom ” by annoying the other belligerent ? Would it not tend “ to endanger the peace “ and welfare of this kingdom ” if all the yards of Liverpool and Hull, and of all the other great naval towns, were avowedly employed in building vessels not intended to be armed in this country, but merely to be made into sailing vessels to be armed elsewhere, and when armed to be employed in war by the Confederates ? Allow, for the purpose of the argument, that it is avowed that the contracts between the Confederates and the builders in

ARGUMENT.

6th Day.

ARGUMENT.

6th Day.

Liverpool, in Hull, and elsewhere, are printed in letters as large as can be employed, and suppose that you know that there is constructing a hundred, or as many vessels as you can choose to suppose, is that a thing not calculated "to endanger the peace and welfare of this kingdom?"

*Mr. Baron Bramwell.*—Do you read the Act of Parliament with this sort of preamble, Mr. Jones: Whereas certain practices are likely to endanger the peace and welfare of this kingdom by causing foreign nations to make a complaint where by the law of nations they have no right to make a complaint?

*Mr. Jones.*—Where by the comity of nations they have such right.

*Mr. Baron Bramwell.*—It is a very dangerous topic, with great respect to you, because although the policy of the Act may have been to prohibit something which no foreign nation had a right to complain of—because foreign nations are not always reasonable, and therefore it was as well to give them no cause, whether reasonable or unreasonable—yet it is obvious that the policy of the Act was to prohibit it in cases where foreign nations had a right to complain: and you then go into questions of international law which I thought the Attorney General threw over.

*Mr. Jones.*—International law does not affect my view of the matter. I say the policy of the Act was to avoid irritation, and to enable the Crown to observe the comity of nations.

*Mr. Baron Bramwell.*—I thought the learned Attorney General had gone a long way to show that the reliance placed upon international law upon the other side was an ill founded one.

*Mr. Jones.*—What I am saying is in perfect keeping with the observations which the Attorney General made, that you are to look at things practically. Now I ask your Lordships whether it is or is not probable that irritation and annoyance are caused by allowing our ports to be turned into ship yards for the construction of ships for the Confederates? The question is answered by events. You know that it is, and independently of facts, it is surely impossible not to feel that whatever tends to make a belligerent nation look upon us as if we were acting a neutrality merely, not being really neutral, which disposes it to look upon us as only pretended neutrals, must be a source of irritation and annoyance to that nation. If you were to suppose that we have not those great advantages of constitution which we have, if you were to suppose the Crown to be despotic for the moment, there would be no doubt whatever that a belligerent might reasonably complain of a neutral nation allowing all its yards to be used for the purpose of calling into existence vessels which were intended and avowed to be intended to be used against the other belligerent. Nobody would doubt that such conduct would be a breach of comity on the part of the despotic neutral. It is because we possess a constitution which forbids the Crown, except under conditions, to do what a despotic monarch may always do, that this Act of Parliament is passed, and was neces-

sary to be passed, in order that by means of it the Crown may be enabled to observe and compel its subjects to observe the comity of the nations. I submit to your Lordships that, assuming it to be necessary to resort to the consideration of policy, your Lordships will not forget that at least nine-tenths of what has been addressed to your Lordships in this case has been to enable you to see that the policy of the Act is something different from that which might reasonably be supposed to arise from the language here employed. I ask your Lordships if your Lordships are satisfied with the argument which has been advanced to you, whether, with that knowledge, and with that narrative of events which has been laid before you, are satisfied that the policy, and the true policy, of this Act, was not to enable the Crown, at its pleasure, to forbid any act which by concession was intended to assist remotely a belligerent? I ask whether there is anything whatever in anything which has been advanced by the other side, which your Lordships can lay hold of, and from which your Lordships can see that the policy of this Act was not to prohibit that which would irritate, annoy, and vex a friendly nation, and that its object only was to prevent what is called, or what in abstract language is called, "proximate acts of hostility"—an expression which may have a great deal more sense in it than I can see.

If there be any force in the observations which I have addressed to you, your Lordships will not fail to observe that this Act would be frustrated if you were to allow any species of equipment, at all events amounting to that height of equipment which should make the vessel take the sea, that is to say, which would enable the vessel to be launched. It is not necessary for my purpose to specify or to distinguish the particular amount of equipment which would be necessary, because I submit to your Lordships that any equipment, granting the intention, would be sufficient. But surely, so far as this case is concerned, and so far as it is necessary to appeal to the construction of the Act for the purposes of this question, your Lordships will see you are relieved from difficulty on that point of the case, because in order to construe the Act it would not be necessary to go further and give a more abstract definition to it than that an equipment such as would satisfy the words of the Act would be such as would enable the vessel to take the sea. This vessel was launched.

*Mr. Baron Pigott.*—Do you mean that after she leaves the builder's yard, then any equipment is within the terms of the Act?

*Mr. Jones.*—I say any equipment in the builder's yard which would enable her to be launched must be an equipment within the Act; and still more, as my learned friend the Attorney General reminds me, such an equipment as would enable her to leave the port.

*Mr. Baron Channell.*—You cannot, in construing an Act of Parliament, leave out the words that are found there. We all

ARGUMENT.

6th Day.

agree that the statute was intended to strike at the attempt or endeavour. It must be an attempt or endeavour to do that which is the subject matter of the possible prohibition. May it be read thus ; if any person "shall, without the leave and licence of Her Majesty for that purpose first had and obtained as aforesaid, " equip, furnish, fit out, or arm, or shall commence or begin to " equip, furnish, or fit out, or arm such ship ?"

*Mr. Jones.*--Yes, certainly, my Lord, that is how I should venture to read it, because it would, in fact, facilitate the application of the word "attempt;" and I go along with many of the observations which I have heard concerning the attempt.

Now, my Lords, I have put before your Lordships two propositions. The first of these propositions is that equipment for the purpose of making the offence is only such equipment as is needed for the purposes of navigation, as distinguished from equipment for the purposes of war. My second proposition is that any equipment for the purposes of navigation is sufficient.

Now, my Lords, with reference to another point, viz., the extent of the equipment, a point to which great attention was paid at the trial, and which my Lord Chief Baron addressed himself to. I will divide that, if your Lordships will allow me, into two parts. 1st, as to whether the vessel must be completed, and 2nd, as to whether the vessel must be completed here, that is to say, in this United Kingdom. Now, my Lords, it surely cannot be necessary to say much upon the question as to whether the vessel must be completed. The few observations which the Attorney General made I should think disposed effectually of any difficulty arising on that head, because the Act being expressly for the purpose of prevention, and the procedure under the Act being by seizure, it would be an idle thing to say that you must wait until the vessel is actually completed. Moreover, if you are to wait till the completion, when is it completed? when will it be completed? That must always be a question of fact, and no reasonable construction of the Act would say that it was intended to be raised by the Act. Then, my Lords, see this other difficulty: not only would the question of completion be associated with and have to be considered with reference to the other parts of the Act, at least with those heads of argument which I have applied myself to, namely, as to the character of the armament and the extent of the equipment, but the difficulty would always arise which my learned friend Mr. Mellish seems to think there is nothing in, namely, the difficulty that if you are to wait until the vessel is equipped, of course, assuming the construction which I assign to the Act to be the true one, you necessarily, I will not say evade, but you necessarily infringe and deny the Act altogether; that is to say, you frustrate its application altogether; because if it be true that you are to wait until the vessel is completed, the vessel may go out side by side with another vessel loaded with arms, and be completed and armed after it has got out of the limits of the kingdom. When that is put as an evasion it is a fallacy. The



way of putting it is not to put it as an evasion, or to enquire whether it is an evasion; but the way to put it is this,—Is it possible to suppose, as a question of construction, that the Act can have been so framed, or that you can put on the words of the Act such a meaning as will enable a thing, so entirely in frustration of its intention, to be effected? It is an argument for the policy of the Act not being such as is assigned to it by the other side when it is said that it may be successfully evaded.

ARGUMENT.

6th Day.

Now, my Lords, if it is necessary to wait until the vessel is completed, you may do everything which it is confessed when done is an evasion of the Act. Mr. Mellish admits you may do this. He says not only may it be completed, but you may sail out (I do not know if those were his words, but that is what he means) with that ship side by side with another ship, and get your armament put on board where it suits you. Well, but if that is so, not only is the Act a dead letter, but it must have been intended by the legislature to be a dead letter. And therefore it is that I say that the argument is addressed to the question of the construction of the Act; it is making the Act absolutely idle.

I now come to the question which the Lord Chief Baron has put, namely, the question of locality,—a question which I apprehend is very easily disposed of. Now, as regards the question of locality, I admit that for the purpose of this Act you must make out that the thing prohibited is done within the United Kingdom. I answer that in a word. The thing prohibited is any act of equipment. Is it not any act of equipment? Let them answer. The question of whether it is or it is not any act of equipment brings back the question to the preceding question.

*Mr. Baron Channell.*—I did not understand that there was any doubt upon this point. If you are right in your former argument, that all that was done within this country would amount to an equipment, no question arises about where it is done.

*Mr. Jones.*—That is as regards the locality. I thought the Lord Chief Baron suggested to me at first the question of locality.

*Lord Chief Baron.*—My object in presenting that was to prevent the intent from being supposed to have any peculiar weight more than any other ingredients. The learned Attorney General put it yesterday to me, not for the purpose that was then under discussion, that to deny yourself is nothing, but to deny yourself with the intention of delay is. It is not the mere intent to delay; you may intend to delay as much as you like, but it must be coupled with the act which the Act of Parliament pronounces, if done with that intent, to be impolitic. Some of the argument, I shall not specify which it was, seemed to think that the intent was everything and the act nothing.

*Mr. Jones.*—No, I do not say that.

*Lord Chief Baron.*—The intent without the act is nothing, as

ARGUMENT.  
6th Day.

the act without the intent is nothing, and the act and the intent are both of them nothing, unless the thing be done in a port in this country.

*Mr. Jones.*—Clearly so, my Lord.

*Mr. Attorney General.*—Done or intended to be done.

*Mr. Jones.*—That is the basis on which I have been addressing your Lordships.

Now, my Lords, what I have addressed to your Lordships bears exclusively on the point of misdirection. Now, my Lords, as I understand the view which at the trial was taken by my Lord, it was that the equipment must be hostile, that is to say, it must be of a warlike character, and that the ship must be completed or intended to be completed here. I humbly submit that that view is one which requires reconsideration. I am quite sure that there were very few people in the world, who, at the time when the trial took place, would pronounce themselves to be fully competent to give an opinion upon that question. But I need not dwell upon any consideration of what occurred at the trial. The question here is, What is the opinion of the Lord Chief Baron and the rest of your Lordships here now upon this most difficult, most abstruse, and most important question? In fact, I would rather prefer, if it could be so done, that your Lordships should not consider the question as a mere question of misdirection, but consider the question as applied to the facts alone, for that is the only fair and reasonable way of doing it. It is idle to say that a learned Judge is wrong in the sense of his being perversely wrong, or clearly wrong, when a mass of facts is thrown, as I may say, before the Court with which the Court has to deal, and which your Lordships see a week of argumentation is necessary to illustrate; it is utterly impossible. If any learned Judge could deal with it, I am quite sure it would be the Lord Chief Baron; and I am persuaded that very likely the learned Attorney General, when he addressed himself to this question, drew, or intended to draw, upon the great experience, upon the great knowledge, and upon the breadth of view which my Lord is known to possess, and which it is his custom to apply to cases of very great importance, of which we have many instances in this Court. My Lords, the question is not a mere question of misdirection. The question is a question of the application of the law to the facts, a great question, and a very important one, and a question which must be decided by reference to very general considerations, and not merely to the question of what occurred in this particular case. The question ought to be looked at as if my Lord had reserved the facts for the consideration of the Court, it being utterly and absolutely impossible to deal with questions of this kind at *Nisi Prius*. The question is the same, I say, as if my Lord had reserved it for the consideration of the Court, and I am happy to know that, whatever may be the end of this case, it has led to a great amendment of the practice of the Court, which I believe is mainly due to the

Lord Chief Baron, for I believe to his Lordship is due the suggestion of so providing that future cases may be canvassed before the highest tribunal ; so that not only this case, but any case of like importance, may be brought under the consideration of the House of Lords. The public are indebted to your Lordships for having made the rule which has had that effect.

*Lord Chief Baron.*—I have no doubt that the discussion which has taken place upon this motion for a new trial has been far more advantageous to the thorough understanding of the thing, and that we have been able to get to the very last point of whatever can be argued far more advantageously by a general discussion, than by argument upon the narrow ground which alone could have been presented in a bill of exceptions.

*Mr. Attorney General.*—No doubt your Lordship is quite right.

*Mr. Jones.*—And for that I think the Attorney General has already intimated that he is very thankful to your Lordships.

*Lord Chief Baron.*—He need not thank me for it, because I hold that a grievous injustice would be done to me by any one who supposed that my resistance to the bill of exceptions was in the least degree disadvantageous to the Crown. I intended to present the alternative, that it would be better to move for a new trial, and take all the points, as you would get your appeal just as well.

*Mr. Jones.*—Your Lordship is so well able to vindicate yourself, that I need not say a word in support of what your Lordship has said ; but I may point out that your Lordship has originated the course of proceeding by which either party, dissatisfied with the judgment of this Court, will be enabled to carry his case to the House of Lords, which could not have been done before the rule made by your Lordship a few days ago.

Now, my Lords, having regard to the full extent to which this discussion has gone, I believe I have occupied your time more than I ought to have done. But perhaps I may be allowed just to offer a word or two on those American cases, and it shall be only a word or two.

*Mr. Baron Bramwell.*—What, about Quincy's case ?

*Mr. Jones.*—The case of the *United States v. Quincy* I regard as an authority for the position which I understand to be conceded by the other side, viz., that the ship need not be armed.

Now, as to the case of the "*Independencia*," allow me here to observe that I really think there is no necessity whatever for making any extended observations upon that case. That case asserts this, that where that is not present which is here present, there is no offence, for the ground of the argument in the case of the "*Independencia*" is, that where there is no intention to employ the vessel except such as may be hindered by a contingency, there is, in fact, no direct or immediate intention to offend against the Act, the Act is not violated by an equipment, or even by an arming. This case amounts to nothing. It is argued, indeed, that because the Act has not provided for such a case as the case before the

ARGUMENT.

6th Day.

Court in the "Independencia," therefore the Act ought to have no operation in those cases for which it has provided. So far, therefore, as the cases of the "Santissima Trinidad" and the *United States v. Quincy* are concerned, I do not think that I need trouble your Lordships with any further observations. I submit to your Lordships that there exists in this case that combination of the elements of equipment and intention which constitutes the offence. I trust we have demonstrated that there is that combination, and if there be that combination, it is a combination which is prohibited, and the statute has been violated, so as to entitle the Crown to the ship.

*Lord Chief Baron.*—The Court will take time to consider its judgment.

---

IN THE COURT OF EXCHEQUER AT WESTMINSTER,  
HILARY TERM, 27TH VICTORIA.

THE ATTORNEY GENERAL v. SILLEM AND OTHERS,  
Claiming the Vessel "*ALEXANDRA*."

Monday, 11th January 1864.

PRESENT:

THE RIGHT HON. THE LORD CHIEF BARON POLLOCK.  
MR. BARON BRAMWELL.  
MR. BARON CHANNELL.  
MR. BARON PIGOTT.

JUDGMENT ON MOTION TO MAKE RULE NISI  
FOR NEW TRIAL ABSOLUTE.

LORD CHIEF BARON.

THIS was an information against the ship "*Alexandra*," charging that the defendants, with others, had been guilty of a violation of the Foreign Enlistment Act in respect of that vessel. The ship "*Alexandra*" had been built and partly rigged at Liverpool, and had been seized on the 6th of April by an officer of the customs, on the ground of a breach of the 7th section of the statute. The defendants claimed the ship, and pleaded that the ship was not forfeited. The information charged them with every possible violation of the Act as to *equipping, furnishing, and fitting out*, but omitted to charge anything in respect of *arming*. The cause was tried before me on Monday the 22nd of June, and three following days. The evidence for the Crown clearly established the warlike character of the vessel—it was not at all adapted for commerce, but was capable of being adapted for warlike purposes—and though it might have been used as a yacht, according to the evidence of Captain Inglefield, it was in all probability intended to be used by the so-called Confederate States as a vessel of war, when adapted for that purpose by *them* (suitable equipments and fittings-up being furnished). And if the making, in pursuance of an agreement or order for that purpose, with intention to sell and deliver to one of the belligerents the hull of a vessel *suitable for war, but unarmed*, and *not* equipped, furnished, or fitted out with anything which enabled her *to cruise or to commit hostilities, or to do any warlike act whatever*, be a violation of the Foreign Enlistment Act, my direction to the jury was wrong in point of law; the verdict

JUDGMENT.

## JUDGMENT.

ought to have been for the Crown, and there ought to be a new trial; but if the commerce of this country in ships, whether ultimately for peace or war, is to continue, and provided a ship leaves the ports of this country in no condition to *cruise* or to *commit hostilities*, though she may be of a warlike character, there has been no violation of the statute, then the verdict was right. And in substance this is the question between the Crown and the defendants, stripped of all technicalities.

The condition in which the vessel (unfinished when she was seized) was intended to leave this country was, perhaps, not perfectly clear, but there was no direct evidence that she was to be made, at Liverpool or in any other British port, fit to cruise or to commit hostilities. I told the jury, in substance, that the sale of a ship was, in my judgment, perfectly lawful, even of a ship so constructed as to be convertible into a ship of war; that the sale of arms and ammunition and every kind of warlike implement was not forbidden by any law, either international or municipal, and that I thought that a ship capable of being used for war might be made and sold, as well as sold (if made), provided she did not leave a port of this country either armed or equipped, or furnished or fitted out within the meaning of the statute; that is to say, with intent or in order to cruise or commit hostilities against a state or power with whom Her Majesty was not at war.

There was no direct evidence that the vessel was intended to be armed at any British port with intent on the part of any of the defendants, or indeed of any one, to cruise or commit hostilities, indeed there was no charge in the information on the subject of *arming* at all, and there was no direct evidence of any intention to equip, furnish, or fit out the ship with intent to cruise or commit hostilities according to what I think is the true meaning of the charge in the information. I, however, left the question to the jury in the terms of the Act of Parliament, and upon this direction with the evidence before them the jury found a verdict for the defendants.

In Michaelmas term the Attorney General applied for a new trial, and obtained a rule to show cause, on the ground stated in the rule, why the verdict should not be set aside and a new trial had. Cause was shown during the term, and the argument lasted six days. We have now to deliver the judgment of the different members of the Court.

It is material, I think, first to call attention to the various charges contained in the information, which consists of 98 counts. The 97th and 98th counts relate to an intent to employ the ship as a transport or store ship as well as to commit hostilities. These counts were given up at the trial by the then Attorney General. The remaining 96 counts consist of the first eight counts repeated 12 times, merely varying the offence charged. The first eight counts charge that the defendants did *equip*, the next that they did *furnish*, the next that they did *fit out*, and so on. Then all the varieties of *attempting*, *procuring*, *aiding*, &c., are introduced, making the total eight times 12, or 96 counts.

The Attorney General at the trial said, "The first eight counts " are those only to which any attention need be paid," not meaning to abandon the rest, but intimating that the first eight represented all the rest. I propose to state in substance what those eight counts are.

The first count charges that the defendants, without the leave, &c. did equip the vessel with intent and in order that such ship or vessel should be employed in the service of the Confederate States with intent to cruise and commit hostilities against a certain foreign state with which Her Majesty was not then at war, to wit, the republic of the United States. The second count resembles the first, but charges that hostilities were to be committed against the *citizens* of the foreign state. The third count charges that the defendants did equip, with intent to cruise and commit hostilities against a foreign state with which Her Majesty was not then at war. The fourth count is similar to the third, varying the description of the parties against whom hostilities were to be committed. The fifth, sixth, seventh, and eighth counts are similar to the first and second, varying only the description in the first and second counts of the belligerent parties who were affected by the conduct of the defendants. The charge, therefore, resolves itself into a charge of equipping, &c. with a certain intent, the intent being stated in two different ways, or a charge of attempting, endeavouring, &c. to equip, or procuring to be equipped, with the same two intents in different counts. If what was intended to be done would not, when done, amount to an equipping, &c. within the Act, then there would be no attempting or endeavouring, &c. contrary to the Act.

The question then arises what is the true construction of the Foreign Enlistment Act, particularly of the seventh section of that statute, upon which the information in this case is framed; and what is the meaning of the words "equip, furnish, or fit out" in that section; and also what is meant by the expression, "with intent to cruise or commit hostilities."

It is a highly penal statute, creating a new crime or misdemeanor, making those who commit it liable to fine and imprisonment, if found guilty, and the ship, the subject of the crime, liable to forfeiture. The attempt or endeavour to commit the offence, or the procuring it to be committed, or the aiding, assisting, or being concerned in the commission of it, is each made criminal, and liable to the same punishment and forfeiture.

In order to have a comprehensive view of the whole subject, it may be useful to become acquainted with the history of the statute and of the act of the American Congress, which is said to have given rise to it. It may be useful also to learn what have been the opinions (differing, it may be observed, widely from each other), of learned jurists and of eminent statesmen, not always agreeing, on the subjects of international law, belligerent rights, and neutral duties. But none of these can furnish veen the semblance of authority for construing an English Act of Parliament, which creates for the first time an indictable offence render-

ARGUMENT.

6th Day.

war between this country and foreign states, or whether any man who chooses for his own purposes, and to put money into his own pocket, shall be at liberty to endanger the peace of this realm and to bring us in contact with foreign nations. That is the real question in this case, and, put in that light, it is a most important one. Viewed with reference to Messrs. Fawcett, Preston, and Company, as I have said before, I do not think that it is an important case at all. They have built this vessel for the Confederate States, and there is no doubt that as they have proceeded in building this vessel they have been remunerated for the expense they have been put to and for their labour. That, I believe, is the course which is always adopted, and therefore the question which your Lordships have to decide is a question of importance as an international question, and not a question of importance as regards those persons who are the defendants in this case.

*Mr. Jones.*—My Lord, I am on the same side, and I propose to offer your Lordships a few observations on the construction of this Act of Parliament, or rather of the 7th section of it. Although the remarks which have been made and the information which has been brought before your Lordships' attention has been very important, I need not say that the question really centres upon the construction of a few words of this section of the Act of Parliament. Your Lordships have, no doubt, been very materially assisted by the very able arguments which have been addressed to your Lordships. But, after all, those arguments have principally been addressed to your Lordships for the purpose of enabling you to put a construction upon the 7th section of the Act of Parliament.

Now, my Lords, I assume, for the purpose of my argument, that there was such an intention as is prohibited by the 7th section; and allowing this assumption, I say the questions arising on this rule resolve themselves into the single question, What is the meaning of these words in the information and in the Act of Parliament, "equip, furnish, and fit out?"

*Lord Chief Baron.*—I should say that the Act of Parliament is directed against certain acts, and then that the attempt, the endeavour, the aiding, and the assisting, are made penal as well as the act itself.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The Act of Parliament is directed against doing certain things at a certain place with a certain intent.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The place is some port in this country, the intent is (because the transports and storeships were given up at the trial) "to cruise or to commit hostilities."

*Mr. Jones.*—To be employed for the purpose of

*Lord Chief Baron.*—Then, the question is, What is the act? That depends upon what is the meaning of "to equip, to fit out, " or to furnish."



*Mr. Jones.*—That is precisely the way in which it struck my mind. ARGUMENT.

*Lord Chief Baron.*—And too much stress must not be laid upon any one part of it. You must not say that I prove the intent, and, therefore, whatever was done with that intent was unlawful, whether it was within the precise words of the Act or not, or whether it was meant to be done somewhere else. The crime that is created, the offence that is made by the Act of Parliament is doing certain matters in a port of this country with the intent to cruise or commit hostilities.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—Then, I apprehend, the only doubt that can exist is, What is the meaning of these words as applied to the subject, “to equip, to fit out, or to furnish.”

*Mr. Jones.*—That is the way in which I ventured at the outset to present it to your Lordships, and that is the point to which, as I humbly observed, the matter must at last be brought round.

*Lord Chief Baron.*—The intent, without the act or the attempt to commit it, can be nothing.

*Mr. Baron Bramwell.*—You must not lose sight of the way in which the Attorney General put it, which I understood to be this: that if there is a thing with an intent that it shall be employed for the service of a foreign prince—

*Mr. Attorney General.*—I rely emphatically upon this, that the ship should be employed by a foreign prince to cruise, and not go straight from the equipment to cruise.

*Mr. Jones.*—I understood the Lord Chief Baron to mean that—in short, I was going to ask his Lordship to vary the expression if it did not mean that.

*Lord Chief Baron.*—I meant merely to point out that there are three matters necessary to constitute the offence. The offence may be either doing the thing or attempting to do it. But supposing, which perhaps may be the most convenient way to have a distinct notion, you limit it to the act itself.

*Mr. Jones.*—Say “equipped.”

*Lord Chief Baron.*—Then there must be, 1st, an equipment, in a port of this country, and, 2nd, it must be with the intent denounced by the Act of Parliament.

*Mr. Jones.*—Precisely so. If I may say so, the offence must include the combination of these two elements, or, in other words, it is the combination of these two elements which constitutes the offence.

Now, my Lords, I have said that for the purpose of my argument I take for granted that the criminal intention is present. I proceed to enquire what is the equipping, furnishing, and fitting out forbidden by the section. I shall use the term equip as comprehending the words furnish or fit out. Now, looking merely to the Act of Parliament itself, and looking particularly to one of the sections of the Act of Parliament, namely the 8th section, (which has been appealed to by Sir Hugh Cairns as

ARGUMENT.

6th Day.

war between this country and foreign states, or whether any man who chooses for his own purposes, and to put money into his own pocket, shall be at liberty to endanger the peace of this realm and to bring us in contact with foreign nations. That is the real question in this case, and, put in that light, it is a most important one. Viewed with reference to Messrs. Fawcett, Preston, and Company, as I have said before, I do not think that it is an important case at all. They have built this vessel for the Confederate States, and there is no doubt that as they have proceeded in building this vessel they have been remunerated for the expense they have been put to and for their labour. That, I believe, is the course which is always adopted, and therefore the question which your Lordships have to decide is a question of importance as an international question, and not a question of importance as regards those persons who are the defendants in this case.

*Mr. Jones.*—My Lord, I am on the same side, and I propose to offer your Lordships a few observations on the construction of this Act of Parliament, or rather of the 7th section of it. Although the remarks which have been made and the information which has been brought before your Lordships' attention has been very important, I need not say that the question really centres upon the construction of a few words of this section of the Act of Parliament. Your Lordships have, no doubt, been very materially assisted by the very able arguments which have been addressed to your Lordships. But, after all, those arguments have principally been addressed to your Lordships for the purpose of enabling you to put a construction upon the 7th section of the Act of Parliament.

Now, my Lords, I assume, for the purpose of my argument, that there was such an intention as is prohibited by the 7th section; and allowing this assumption, I say the questions arising on this rule resolve themselves into the single question, What is the meaning of these words in the information and in the Act of Parliament, "equip, furnish, and fit out?"

*Lord Chief Baron.*—I should say that the Act of Parliament is directed against certain acts, and then that the attempt, the endeavour, the aiding, and the assisting, are made penal as well as the act itself.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The Act of Parliament is directed against doing certain things at a certain place with a certain intent.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The place is some port in this country, the intent is (because the transports and storeships were given up at the trial) "to cruise or to commit hostilities."

*Mr. Jones.*—To be employed for the purpose of

*Lord Chief Baron.*—Then, the question is, What is the act? That depends upon what is the meaning of "to equip, to fit out, or to furnish."

*Mr. Jones.*—That is precisely the way in which it struck my mind. ARGUMENT.

*Lord Chief Baron.*—And too much stress must not be laid upon any one part of it. You must not say that I prove the intent, and, therefore, whatever was done with that intent was unlawful, whether it was within the precise words of the Act or not, or whether it was meant to be done somewhere else. The crime that is created, the offence that is made by the Act of Parliament is doing certain matters in a port of this country with the intent to cruise or commit hostilities.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—Then, I apprehend, the only doubt that can exist is, What is the meaning of these words as applied to the subject, “to equip, to fit out, or to furnish.”

*Mr. Jones.*—That is the way in which I ventured at the outset to present it to your Lordships, and that is the point to which, as I humbly observed, the matter must at last be brought round.

*Lord Chief Baron.*—The intent, without the act or the attempt to commit it, can be nothing.

*Mr. Baron Bramwell.*—You must not lose sight of the way in which the Attorney General put it, which I understood to be this: that if there is a thing with an intent that it shall be employed for the service of a foreign prince—

*Mr. Attorney General.*—I rely emphatically upon this, that the ship should be employed by a foreign prince to cruise, and not go straight from the equipment to cruise.

*Mr. Jones.*—I understood the Lord Chief Baron to mean that—in short, I was going to ask his Lordship to vary the expression if it did not mean that.

*Lord Chief Baron.*—I meant merely to point out that there are three matters necessary to constitute the offence. The offence may be either doing the thing or attempting to do it. But supposing, which perhaps may be the most convenient way to have a distinct notion, you limit it to the act itself.

*Mr. Jones.*—Say “equipped.”

*Lord Chief Baron.*—Then there must be, 1st, an equipment, in a port of this country, and, 2nd, it must be with the intent denounced by the Act of Parliament.

*Mr. Jones.*—Precisely so. If I may say so, the offence must include the combination of these two elements, or, in other words, it is the combination of these two elements which constitutes the offence.

Now, my Lords, I have said that for the purpose of my argument I take for granted that the criminal intention is present. I proceed to enquire what is the equipping, furnishing, and fitting out forbidden by the section. I shall use the term equip as comprehending the words furnish or fit out. Now, looking merely to the Act of Parliament itself, and looking particularly to one of the sections of the Act of Parliament, namely the 8th section, (which has been appealed to by Sir Hugh Cairns as

ARGUMENT.

6th Day.

war between this country and foreign states, or whether any man who chooses for his own purposes, and to put money into his own pocket, shall be at liberty to endanger the peace of this realm and to bring us in contact with foreign nations. That is the real question in this case, and, put in that light, it is a most important one. Viewed with reference to Messrs. Fawcett, Preston, and Comp'any, as I have said before, I do not think that it is an important case at all. They have built this vessel for the Confederate States, and there is no doubt that as they have proceeded in building this vessel they have been remunerated for the expense they have been put to and for their labour. That, I believe, is the course which is always adopted, and therefore the question which your Lordships have to decide is a question of importance as an international question, and not a question of importance as regards those persons who are the defendants in this case.

*Mr. Jones.*—My Lord, I am on the same side, and I propose to offer your Lordships a few observations on the construction of this Act of Parliament, or rather of the 7th section of it. Although the remarks which have been made and the information which has been brought before your Lordships' attention has been very important, I need not say that the question really centres upon the construction of a few words of this section of the Act of Parliament. Your Lordships have, no doubt, been very materially assisted by the very able arguments which have been addressed to your Lordships. But, after all, those arguments have principally been addressed to your Lordships for the purpose of enabling you to put a construction upon the 7th section of the Act of Parliament.

Now, my Lords, I assume, for the purpose of my argument, that there was such an intention as is prohibited by the 7th section; and allowing this assumption, I say the questions arising on this rule resolve themselves into the single question, What is the meaning of these words in the information and in the Act of Parliament, "equip, furnish, and fit out?"

*Lord Chief Baron.*—I should say that the Act of Parliament is directed against certain acts, and then that the attempt, the endeavour, the aiding, and the assisting, are made penal as well as the act itself.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The Act of Parliament is directed against doing certain things at a certain place with a certain intent.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—The place is some port in this country, the intent is (because the transports and storeships were given up at the trial) "to cruise or to commit hostilities."

*Mr. Jones.*—To be employed for the purpose of

*Lord Chief Baron.*—Then, the question is, What is the act? That depends upon what is the meaning of "to equip, to fit out, " or to furnish."

*Mr. Jones.*—That is precisely the way in which it struck my mind. ARGUMENT.

6th Day.

*Lord Chief Baron.*—And too much stress must not be laid upon any one part of it. You must not say that I prove the intent, and, therefore, whatever was done with that intent was unlawful, whether it was within the precise words of the Act or not, or whether it was meant to be done somewhere else. The crime that is created, the offence that is made by the Act of Parliament is doing certain matters in a port of this country with the intent to cruise or commit hostilities.

*Mr. Jones.*—Yes, my Lord.

*Lord Chief Baron.*—Then, I apprehend, the only doubt that can exist is, What is the meaning of these words as applied to the subject, “to equip, to fit out, or to furnish.”

*Mr. Jones.*—That is the way in which I ventured at the outset to present it to your Lordships, and that is the point to which, as I humbly observed, the matter must at last be brought round.

*Lord Chief Baron.*—The intent, without the act or the attempt to commit it, can be nothing.

*Mr. Baron Bramwell.*—You must not lose sight of the way in which the Attorney General put it, which I understood to be this: that if there is a thing with an intent that it shall be employed for the service of a foreign prince—

*Mr. Attorney General.*—I rely emphatically upon this, that the ship should be employed by a foreign prince to cruise, and not go straight from the equipment to cruise.

*Mr. Jones.*—I understood the Lord Chief Baron to mean that—in short, I was going to ask his Lordship to vary the expression if it did not mean that.

*Lord Chief Baron.*—I meant merely to point out that there are three matters necessary to constitute the offence. The offence may be either doing the thing or attempting to do it. But supposing, which perhaps may be the most convenient way to have a distinct notion, you limit it to the act itself.

*Mr. Jones.*—Say “equipped.”

*Lord Chief Baron.*—Then there must be, 1st, an equipment, in a port of this country, and, 2nd, it must be with the intent denounced by the Act of Parliament.

*Mr. Jones.*—Precisely so. If I may say so, the offence must include the combination of these two elements, or, in other words, it is the combination of these two elements which constitutes the offence.

Now, my Lords, I have said that for the purpose of my argument I take for granted that the criminal intention is present. I proceed to enquire what is the equipping, furnishing, and fitting out forbidden by the section. I shall use the term equip as comprehending the words furnish or fit out. Now, looking merely to the Act of Parliament itself, and looking particularly to one of the sections of the Act of Parliament, namely the 8th section, (which has been appealed to by Sir Hugh Cairns as

ARGUMENT.

6th Day.

throwing a flood of light upon the Act,) for the purpose of interpreting the 7th section, I submit to your Lordships that this 8th section contemplates two species of possible equipments. It contemplates a species of equipment which it does not forbid, and it contemplates a species of equipment which it does forbid. Your Lordships will remember, without adverting again to the language of that clause, that the 8th section, addressing itself to the equipment of a pre-existing vessel in a neutral port, speaks of equipments for the sole purposes of war. I do not recollect whether that is the precise expression.

*Mr. Baron Channell.*—No, it is not.

*Mr. Jones.*—“Any equipment for war.” The precise expression is, any equipment for war. Now, my Lords, when the Act uses the expression “equipped” in the 7th section, your Lordships will notice that it does not use in that section the word “equipment” in that sense and with that specific distinction which it ascribes to “the equipment for war” which is contemplated by the 8th section; and for very good reasons, because it is very easy to understand how there may be an equipment for other than purposes of war before the vessel is brought into the condition of a ship of war, and how there may be an equipment for other than purposes of war after the vessel has been brought into the condition of a ship of war; but the equipment forbidden is that which is described as an “equipment for war.” The way in which I use that, and the manner in which I consider that that section does throw a flood of light upon the question, is, that inasmuch as you have by the words of that section an equipment described as an “equipment for war,” inasmuch as you have the term “equipment” used in the 7th section without any such limitation, you must see that the Legislature had in its contemplation two species of equipments; and the argument is clenched, if I may be permitted to say so, by the use in the 7th section of the disjunctive conjunction. When you see used in the 7th section “equip or arm,” and when you see used in the 8th section “equipment for war,” you have in effect in the 8th section an expansion of that expression “arm” in the 7th, and read by the light of the 8th section, the 7th section says, “If any one shall equip a ship for the purposes of navigation or for the purposes of war with the intention, &c., the ship shall be forfeited.” So that, the prohibited intention being present, the equipping for the purposes of navigation, which aids the execution of that intention, is as much forbidden as arming is. The term “arm,” as used in the 7th section, is in effect the same thing, or at all events part of the same thing, which is included in the expression “arm for the purposes of war,” used in the 8th. Now, my Lords, passing from the 8th section to the 7th section, if you look at the provision with respect to the equipment which is spoken of in the 7th section as the equipment of a transport, you will find that the equipment of a transport does not suppose an equipment for the purpose merely of navigation, as dis-

tinguished from an equipment which would enable the transport when equipped as contemplated by the Act to cruise or commit hostilities. The words "equip, furnish, and fit out" are applied not to a ship of war, or to a ship which is to cruise or commit hostilities, but they are applied to a ship which is not to cruise, which is not to commit hostilities, but which is to act as a transport or store ship. When, therefore, you have got the word equip for the purpose of a transport, in reality you have a distinctive application made of that term "equip" in the 7th section, as importing an equipment other than an equipment for a hostile purpose, or in a hostile fashion. And, my Lords, although it is true that the structure of the vessel, its capabilities, its adaptation to the purposes of war are very important to be considered when the intention is in question, yet if you grant the intention, there is no use whatever in inquiring as to whether or not the structure of the vessel is such as to make it capable of being adapted for the purposes of war. If, indeed, the structure were such as that it could not be used as a transport, for instance, or could not be used for a cruiser, or to commit hostilities, that would negative the intention; but granting the intention, which of course could not be granted unless the vessel were of a structure which would suit it, and the possibility of its being executed by the structure in question, the kind of structure is not material; the intention being present, the question really is, whether the words "equip, furnish, and fit out" can by possibility extend to anything more than an equipment for the purpose of navigation. I address to your Lordships those observations with reference merely to the words which are found in the Act. I cannot help thinking that when you find words in an Act of Parliament capable of being interpreted so as to make the whole Act consistent and intelligible, that is a far more valuable test than a discursive inquiry as to what the policy of the Act may be. If you can see that a word is used in one section which is consistent with its interpretation in a fixed sense in that section, and which is consistent with its interpretation in that sense in other sections of the Act (say, in one other section of the Act), it would require a great deal indeed to show you, either from conjecture, or from considerations of policy, or from any consideration except some absurdity or repugnancy, that it should not be accepted in that fixed sense, which I venture to call the natural sense.

I shall presently offer to your Lordships an observation or two with regard to the policy of the Act, but I dwell for a moment upon the observation that the quality of that "equipping, furnishing, and fitting out," is only material when the intention is in question. When the intention is in question you look to see whether or not the structure of the vessel is such, or the fittings of the vessel, so to speak, are such, as to reconcile and make the structure of the ship compatible with the existence of

ARGUMENT.

6th Day.

## JUDGMENT.

statute does not warrant their making any such charge. But, assuming it to be correct, then the question arises whose intent does the information mean? Who is it that the information charges with an intent to cruise and commit hostilities? According to all the rules of pleading, it must be the intent of the person committing the act; and this view would make all the counts in substance to mean much the same thing; that is to say with reference to the intent. There was no direct evidence that the persons "equipping, fitting out," &c., or "aiding, assisting," &c., "in equipping," &c., had any intention to cruise or commit hostilities at all; and, if so, the whole charge would fail altogether. The Attorney General would read, "with intent to commit hostilities," as if the expression were, *with intent that hostilities should be committed by somebody*; but that mode of reading the expression is contrary to the rules of pleading and to all authority on the subject; and especially it seems to me to be contrary to what was decided in *The United States v. Quincy*, of which a full report is given in the appendix to the trial. I wish to call particular attention to this case, and to the two answers of Mr. Jefferson, referred to by the Solicitor General in the course of his argument. I think that those answers lead to a construction quite different from that suggested by the counsel for the Crown. Mr. Jefferson's answers clearly show what was the opinion of the American Government; and the decision of the Supreme Court, in *The United States v. Quincy*, is the best authority as to the state of the law. The first answer refers to arms and ammunition—not to ships at all. Mr. Jefferson says, "Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress those callings, (the only means, perhaps, of their subsistence,) because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice."

Why, I would ask, should not this view of the subject of industrial pursuits apply to ships and shipbuilders in England? In America it apparently does apply. The second answer relates to ships, but Mr. Jefferson does not say anything in disapprobation of a mere supply of ships, even ships of war. What he says is this, "But the practice of *commissioning*, equipping, and manning vessels in our ports to cruise on any of the belligerent parties is entirely disapproved, and the government will take effective measures to prevent it," and accordingly the 3rd section of the Act of Congress is directed against fitting out and arming, and also against commissioning. The 7th section of our Act is directed against equipping, furnishing, fitting out, or arming, and also against commissioning. But there is not a single syllable against shipbuilding, or selling, or making for sale, ships, even of a warlike character. So with respect to the law and the construction of the American Act of Congress. The judgment delivered by Mr. Justice Thompson in the *United States*, in the case of "*The United States v. Quincy*," gives to the citizens of the



United States a right to send armed vessels out of their ports. It aims at preventing the citizens themselves from committing hostilities against foreign powers at peace with the United States, but leaves them at perfect liberty to sell the vessel to one of the belligerents, and provided hostilities are not committed by the citizens of the United States there is no breach of the law. The accompanying remark of the learned Judge which immediately follows, proves that the Attorney General is endeavouring to enforce against British shipbuilders a principle which the Supreme Court of the United States altogether repudiates as applicable to citizens of the United States. If our statute was passed to give to the United States and other countries the same advantage that their Act of Congress gave to us, there may be a reciprocity in words, but there is no reciprocity in reality and in construction if the argument for the prosecution is to prevail. Mr. Justice Thompson says, "All the latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war," which I understand to mean that, the citizens of the United States have a right to build what ships they please, and dispose of them as they please, provided they do not themselves take part in the war, and the ships are not employed by them to commit hostilities. And what pretence is there for giving to our Foreign Enlistment Act, with respect to shipbuilding, a construction totally different from that which the Act of Congress bears, according to the judgment of the American judges themselves in their Supreme Court?

There is indeed, a difference of expression between the Act of Congress and our statute,—they have merely the words "with intent," we have "with intent or in order." The Attorney General says that he supposes that the words "in order" were added to avoid some evasion or quibble. I believe that they were added to leave no doubt as to the meaning; the expression "in order" is explained in Todd's Johnson to signify "means to an end," and Jeremy Taylor, Tillotson, and Swift are quoted as authorities—the passage from Swift is, "One man pursues power in order to wealth"—that is, power is the "means," wealth is "the end." And the 7th section forbids equipping a ship or vessel as a "means" to "the end" of cruising, or committing hostilities. In all common sense and understanding, if the nature of the equipment has no reference whatever to the commission of hostilities, it cannot be the "means to that end," and there is no breach of the statute by that sort of equipment. Webster's American Dictionary gives precisely the same explanation of the words "in order." And this leads me to remark that even the word "intent" alone, and without "in order" which is put in, as, I think, to explain it and give it the true meaning which an English lawyer would assign, ought not to lead to a different conclusion. The Attorney General seems to think that if there be an intent, and if anything of whatever kind be done in pursuance of it, that is sufficient

**JUDGMENT.** With great respect for the opinion of so eminent a lawyer, in my judgment that is not sufficient. If a statute simply made it a felony to attempt to kill any human being or to conspire to do so, an attempt by means of witchcraft or a conspiracy to kill by means of charms and incantations would not be an offence within such a statute. The poverty of language compels one to say "an attempt to kill by means of witchcraft," but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means: but human laws are made not to punish sin, but to prevent crime and mischief.

I am, therefore, of opinion, that the 7th section should be construed as if the words were "if any person," in the places mentioned, "shall, without the leave, &c., equip, as a means, any ship " or vessel to the end that such ship shall cruise or commit hostilities;" and so read, if after all the equipping or furnishing or fitting out the ship is incapable of cruising or committing hostilities, there has been no such equipping, &c., as the statute was intended to prevent.

And this brings me to the meaning of the words "equip," "furnish, fit out," and "arm," for they must all be considered together; and the question is not so much what did the legislature mean, as what is the meaning of what they have said—of the words they have used. A clause, admitted to be awkwardly framed, by no means free from difficulty and of considerable doubt, was scarcely worth the very minute criticism and comparison which it has received; but on the part of the prosecution it is contended that the 7th clause was meant to put ships constructed for war or adapted to war upon a footing different from any other munitions of war; to leave cannon of every description, arms of all sorts, gunpowder, and shot and shell, to be freely supplied to either belligerent, but that no ship or vessel of a warlike character in any respect was to be furnished to a belligerent with whom this country was not at war. If this had been the object of our legislature, it might have been accomplished by the simplest possible piece of legislation; it might have been expressed in language so clear that no human being could entertain a doubt about it, instead of the awkward, difficult, and doubtful clause, which it is admitted on the part of the Attorney and Solicitor General, we have to deal with. It cannot be suggested that the object was to conceal from the shipbuilders the ultimate effect of the clause, and to prevent a clamour on the part of the builders of ships, that they were interfered with in a way which the casters of cannon and the makers of gunpowder were not. There is not a syllable in the Act of Parliament, nor in anything connected with it, nor in any cotemporary proclamation, speech, or publication of any kind professing to put ships on a footing different from any other implement of war; and it was admitted most distinctly by the Attorney General, and I think correctly enough, that there was no foundation for any such distinction in international law. But what is the ground of this distinction between cannon, ammu-

dition, and other articles of that description, and ships? I think it was insisted upon entirely without any sufficient foundation. The Attorney General says, as I understand him, that as far as international law is concerned, there is no distinction between them, and that the distinction arises from our municipal law. He entirely agrees with me upon the subject, except as far as the municipal law makes a difference. His expression is, "I entirely subscribe to what fell from the Lord Chief Baron at the trial, that it could make no difference whether there was a sale of a thing ready made without a previous contract, or a delivery under a contract." No doubt, he says, that would be so if no legislation made a difference, and he considers that the Foreign Enlistment Act made that difference, and his reason is a singular one. He says that Her Majesty has the power whenever she pleases to prohibit every other species of contraband trade, but that she has no power to deal with a ship, so that ships are left out, to be dealt with under the Foreign Enlistment Act. The present statute forbidding the exportation of arms, ammunition, and so on is the 16th & 17th of Victoria, passed in 1853, founded on a statute, the 3rd & 4th of William the 4th, chapter 52, passed in 1833. I cannot find in the Index to the Statutes any earlier one. So that the construction of the Foreign Enlistment Act passed in 1819, is apparently made to turn upon an Act passed in 1833.

JUDGMENT.

The result of the argument on the part of the Crown seems to be this. A shipbuilder may build a ship altogether of a warlike character, and may arm it completely with the latest and most mischievous invention for the destruction of human beings, and may then sell it to one of two belligerents, with a perfect fitness for immediate cruising, and ready to commit hostilities the instant it is beyond the boundary of neutral territory, provided there was no previous contract or agreement for it. But if there be any contract or agreement for it, it cannot be made to order with the slightest warlike character about it, though this be part of the accustomed and usual trade of this country, and though the ship leaves our shores a mere hull utterly incapable of cruising or committing hostilities, and as far as war is concerned as innocent and harmless as the mere timber would be of which it is built. The means of evasion which this furnishes is obvious. A signal, a word, a gesture, may convey an order wholly incapable of being proved. It is unnecessary to dwell upon this; it is at once perfectly obvious; and the real difference between a crime and an act of commerce may, in point of evidence, entirely disappear. To use an expression borrowed from one familiar in Westminster Hall about a coach and six, a whole fleet of ships might sail through such an Act of Parliament as this, if this be the meaning of it; and we are to believe that our legislators exhausted all their wisdom in settling the language of the 7th clause, and had none remaining to perceive the enormous loophole which they had left.

Again, a British subject may buy a vessel of war rejected by our navy, fit it up and arm it, and sail with it to a port of either

JUDGMENT.

belligerent to sell it; but if either belligerent should, by an agent, purchase it at a public sale by auction, he cannot put a mast into it, or hoist a sail to reach his own country; but an armed vessel of either belligerent may come into our ports and obtain whatever mere naval but not warlike stores she may require, so as to enable that ship to reach some other port. Observe, coming into a port completely armed, he may refit and repair; but being altogether unarmed, he cannot put up a mast or a sail merely to take that vessel across the ocean. I cannot believe that the sound construction of an Act of Parliament passed within 50 years of the present time can by possibility lead to such an amount of inconsistency and absurdity, and I may add injustice, as is involved in the construction which we are asked with so much earnestness to put upon this statute. It seems to me to amount almost to that degree of what is said to be repugnance to common sense which ought, according to the golden rule, to defeat the effect, even if the words conveyed the meaning, which they certainly do not.

In my judgment the Act was not framed in order to make any difference between ships of war, and guns, ammunition, and other implements of war, but to prevent our shores from being made the points of departure of hostile expeditions *commissioned* and *equipped* to commit hostilities against a belligerent not at war with us. The 7th section, therefore, forbids the issuing or delivering a commission as well as equipping in order to commit hostilities; for without a commission any act of hostility would be a clear and undoubted act of piracy, and there was no occasion for a new law against piracy. To suppose that the Legislature left to British shipbuilders the power and right to *build* ships for war, as before the statute, but that they meant by the words "equip, furnish, and fit up," to forbid them from sailing away, however harmless and innocent of war their condition might be, is I think an unworthy imputation on the good faith of those who made the law. There can be no doubt they did not mean to permit a ship or vessel to go away *armed*, for they have said so distinctly; but "*arming*" admits of many degrees, and a doubt might arise, if the word "*arm*" alone had been used, what degree of arming would constitute the offence. But the degree is settled and determined by taking the whole sentence: the ship is not to be equipped, &c., in order to cruise or commit hostilities; if the equipment amounts to that the law is broken; if it does not, no offence has been committed.

With respect to the Rule, I am of opinion that none of the grounds upon which it was moved ought to prevail, and that the Rule ought to be discharged.

MR. BARON BRAMWELL.

THE law that governs this case is a written law, an Act of Parliament, which we must apply according to the true meaning of the *words* used in it. We must not extend it to anything not

within the natural meaning of those words, but within the mischief or supposed mischief intended to be prevented, nor must we refuse to apply it to what is within that natural meaning, because not or supposed not to be within the mischief.

In this, as in other cases of doubtful meaning, it is legitimate to resolve that doubt by ascertaining the general scope and object of the enactment. And, accordingly, international law has been referred to, certain propositions have been laid down in that necessarily vague science, and it has been argued that the Act was passed merely to enable the Crown to enforce the observance of that law by its subjects, and so it has been sought to find its meaning. But it is clear to me that the statute prohibits some things which are not, and I strongly incline to think permits some things that are, prohibited by international law. In the result, I concur with the learned Attorney General, that the question which we have to answer cannot be solved by treating the statute as a mere enforcement of international law.

Again, it may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it; and so, perhaps, history may be referred to, to show what facts existed, bringing about a statute, and what matters influenced men's minds when it was made. But we know that in our legislation an argument may be used in support of the principle of a Bill which is consistent with particular provisions of great variety; and we know that in all legislation where it is intended to prohibit a thing, it may be necessary to prohibit others, under colour of doing which the thing intended to be prohibited may be done. This, therefore, affords no certain clue to the meaning of this enactment. Nor would ascertaining the objects of the authors of the American Act, from the provisions of which in our Act there is a purposed difference.

It becomes necessary then minutely to scrutinise the *words* of our statute, and interpret them with such assistance (if any) as can be got extra its four corners. Now it is no doubt a penal statute, but I think it ought to be construed as laid down by the late Mr. Sedgwick in his book on Statutory and Constitutional Law. He says at p. 326, "But the rule that statutes of this class are to be considered strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope;" a passage in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and

## JUDGMENT.

American, which he cites. And I must here record the well-founded remark of the Attorney General to the effect, that whereas formerly statutes being extended equitably, as it was called, beyond their natural meaning, penal statutes were exempt from such extension; now that such liberties are not taken with statutes, there is no reason for construing penal statutes on such different principles as were formerly applied. Nor, I confess, can I think, that the interests of the shipbuilding or any other trade are so concerned in this matter as to afford an argument in favour of the defendant's construction.

I now come to the very words of this much debated section 7. I leave out all which are needless to the matter in hand. I am satisfied that the words "equip, furnish," and "fit out," are not limited to transports and store ships. The rule which interprets "*reddendo singula singulis*," cannot apply here; because all the words "equip, furnish," and "fit out," are sensible in reference to vessels intended to cruise or commit hostilities. The section reads thus: "If any person within any part of the United Kingdom shall equip, furnish, fit out, or arm any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a transport or store ship, or with intent to cruise or commit hostilities," &c. Now we have to ascertain the meaning. On the part of the Crown it is said, that if there is an intent that the ship shall be employed in the service of any foreign prince, with intent to cruise or commit hostilities, any equipment with that intent is sufficient, however unfit to accomplish such intent; that the rigging, victualling, manning, and other parts of equipment are lawful or not according to the intent with which the ship will be used by those for whom they are done. This is said to be according to the very words of the statute. Supposing it to be so, it seems to me that the difficulty is only shifted; that the question remains and becomes this, What is the meaning of the words "with intent or in order that such ship shall be employed in the service of any foreign prince with intent to cruise or commit hostilities?" Does the expression mean with intent or in order that by means of such equipment she may cruise or commit hostilities, that she shall be in a condition for proximate hostilities, so that the port which she leaves will be a "station of hostilities?" or does it mean, as contended by the Crown, that an intent is within the statute, where the equipment is in order that she may be employed in the service of a foreign prince, though further acts on his part are necessary to enable her to cruise or commit hostilities?

I think that this is a correct statement of the question, and it seems to me that it must be answered adversely to the Crown's contention. I think that the fair and natural meaning of the words is, that the equipment must be fit for cruising or the commission of hostilities. The word "intent" before to "cruise or commit hostilities" seems put there on purpose to show this. But I dislike relying on a single word. Let it then be rejected,

and the statute read thus: "If any person shall equip any ship with intent or in order that such ship shall be employed in the service of any foreign prince to cruise or commit hostilities." Now what would be the meaning if the words were, "if any person shall equip any ship with intent or in order that such ship shall cruise or commit hostilities in the service of any foreign prince?" Surely that would require an equipment suited for such cruising. Do those words differ from the following: "If any person shall equip any ship with intent or in order that such ship or vessel shall be employed to cruise or commit hostilities in the service of any foreign prince?" And do these latter words differ from those in the statute? I think not. Take Mr. Mellish's illustration. If the words were, "equip with intent or in order that the ship shall be employed in the service of a merchant in the whale fishery," could it be said that any equipment or intent would be within the Act, unless the equipment was or was meant to be fit for whaling?

I think that this is the plain, fair, and natural meaning of the words by themselves, but there are collateral considerations to the same effect. Building is not prohibited, selling is not prohibited. I do not agree with Mr. Mellish that if the statute does not prohibit building, it must necessarily permit equipping. It is possible that the Legislature meant, You may build, which is harmless unless you equip, and that you may not do. But it seems to me that the omission of "build" and "sell" shows that something beyond a harmless ship and equipment was meant to be prohibited. It may be said that selling an equipped, armed, and manned ship is not prohibited, in words at least, and therefore that no argument can be derived from the omission of "build" and "sell." My answer is that there are no ready-made ships equipped and armed for sale, they are done to order; there was no need therefore to prohibit what never has happened or could happen. Such a prohibition, therefore, would be useless, whereas a prohibition of building and selling would not.

Again Mr. Karlake's argument comes in: A man has a ship for sale; he may sell it to a belligerent if he does nothing to it; he may equip it if the buyer means to use it as a packet ship, but the same equipment is unlawful if the *buyer's* intent is different. So that the misdemeanor is committed or not, according to the intent, not of the equipper, but of his customer. Because, suppose the equipper says, and truly, "I equipped it, that the buyer might do as he pleased with it. I cared not what that was," what intent is there then in the equipper's mind that she shall be employed to cruise? Moreover, the words are, "in order that," &c. Can there be an equipment in order that a vessel may be employed to cruise unless the equipment is calculated to enable her to do so? Again, surely the equipment of a vessel "with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a store ship or transport," means an equipment as such, or an intent that such equipment should enable it so to be employed.

## JUDGMENT.

Read the enactment without the word "employed," and can there be a doubt of the meaning? Does the use of that word make any difference? I think it cannot properly be said that a man does an act with intent, unless he intends the act to bring about the thing intended, or unless the act is particularly fitted to do so. Thus, if a man builds a ship in which *he* means to go on a whaling voyage, he builds with the intent that the ship shall go on a whaling voyage though unfit for whaling; but if he builds her for another, he does not build her with intent that she shall go whaling unless he particularly adapts her to that service. In this case, if "building" with intent that the vessel should be employed to cruise had been forbidden, I think the forfeiture would have been incurred, for by her build she is particularly adapted for that purpose; but the word "equip" is used, and there is no forfeiture unless there is an equipment particularly fitting her for cruising, the equipper himself not intending to cruise in her.

I now come to section 8. This section is relied on by counsel of great ability on each side as being in his favour. It seems to me to be strong for the defendants. It, by implication, permits any equipment to a vessel already armed, provided it is not an equipment for war. If the "*Alabama*," with her armament, could run into an English port, whatever was done to her in this country before, in the way of equipment, could be done now lawfully, and she might sally forth armed and equipped, though it is said the equipment alone was unlawful. It is said that such ship must have been equipped before, but she may have lost her masts, sails, or screw, and according to the argument of the Crown, they may be replaced if she is armed already, but not if she is unarmed. Or she may come here armed, and have her equipment bettered to any extent; she may have new masts, rigging, sails, boilers, or engines, but any one of these, if she is unarmed, is unlawful.

Further, in section 2, British subjects are prohibited from serving in vessels used, fitted out, or equipped, or intended to be used for any warlike purpose. Surely the vessel in which service is prohibited by this section must be capable of fighting. Again, the title and preamble both show that the statute was directed against fitting out and arming for warlike purposes and operations. Section 2 is in the same sense.

It is said that this construction requires the vessel to be *armed* to be within the Act, and that so the words "furnish, "fit out, and equip" are superfluous. I agree that they are not to be so treated, if it can be avoided, though I strongly incline to think that the person who used them attached no very definite idea to them. In the title it is "fit out or equip," without "arm." In the preamble it is "fit out and equip *and* "arm." In section 2 it is "used, fitted out, or equipped, "or intended to be used for any warlike purpose." In section 7 the words are "equip, furnish, fit out *or* arm." Surely no precise idea was in the mind of the author of these varying though similar expressions. The probable intent was to use



sufficiently comprehensive words, and to avoid such a question as whether a ship was "armed" strictly speaking, and to make it enough if she was equipped for warlike purposes. Such a case may well be, that the ship, though not armed, is equipped for warlike purposes. By "armed," I suppose it would be meant ordinarily that she had cannon, but if she had a fighting crew, muskets, pistols, powder, shot, cutlasses, and boarding appliances, she might well be said to be equipped for warlike purposes, though not armed.

On these grounds, independently of authority, and on the very words of the Act, I think that the construction contended for by the Crown is wrong, and that that of the defendants, prominently put by Mr. Mellish, is right, viz., that the section prohibits that equipment only which is itself such, that by means of it the vessel can commit hostilities, and that no equipment which gives no means of attack and defence is within section 7.

It may be said this is a lawyer's mode of dealing with the question, merely looking at the words. It is so, and I think it right. A judge, discussing the meaning of a statute in a Court of law, should deal with it as a lawyer and look at its words. If he disregards them and decides according to its makers' supposed intent, he may be substituting his for theirs, and so legislating. As has been excellently said, "Better far be accused of a narrow prejudice for the letter of the law, than set up or sanction vague claims to discard it in favour of some higher interpretation, more consonant with the supposed intentions of the framers or the spirit which ought to have animated them." Important as are the objects of this statute, it must be construed on the same principles as one regulating the merest point of practice or other trifling matter.

But I am willing, as far as possible, to look beyond the mere words of the enactment, to look at its general scope and intent, and to take what is called a broader view. In my opinion the statute was intended to prevent any of the subjects or territories of this country from being belligerent; to prevent them from being immediately or proximately concerned in hostilities between foreign belligerents. With this object it forbids British subjects to enlist in foreign service for hostile purposes *everywhere*, whether the enlistment is in or out of the Queen's dominions. It forbids every one, whether a subject or not, to enlist persons *within the Queen's dominions*. It forbids the fitting out of vessels of war in the *Queen's dominions* by all persons, whether the Queen's subjects or not. It thus forbids the British subject being a combatant, and the British territory a station of hostilities. It is personal and local to the extent of the Queen's sovereignty. It does not forbid the British subject, if abroad, from fitting out and arming a ship, nor if here from building and peacefully equipping it. Those provisions of the statute which forbid enlistments of British subjects anywhere go beyond the municipal enforcement of international law, but as far as those of the provisions of section 7, now in question, are concerned, it was intended to

8341. M M

## JUDGMENT.

prevent the subjects of this realm giving cause of complaint of violation of international law by making the country a station of hostilities. I think that a vessel, departing neither armed nor equipped so as to be capable of attack or defence, is not a violation of international law, be its object what it may. No doubt the equipment of a vessel as a transport is prohibited by this Act, and yet such a vessel is not "equipped for warlike purposes," nor is the port from which she departs a station of hostilities. But, as I have said, I know that in some cases the statute goes beyond the rules of international law; in the provisions in question I think it does not. Historically we know how these words, inconsistent with the title and the preamble, were introduced.

Further, if we consider the different matters brought forward to assist us in putting a construction on this Act of Parliament, they all seem to confirm the opinion which I have expressed. There is no doubt what was the origin of the statute; what was the object immediately in view. It was to prevent the issuing forth of hostile expeditions from British territory. It was not, to judge from its history and the speeches made in reference to it, to prevent the departure from this country of vessels incapable of attack or defence. So of the American statute. Its origin and the object immediately in view are well known. They were the same as in the case of our statute. Nay, we know from American authority that it was intended not to prevent a commerce in vessels of war. But the language of the American statute is decisive. In section 3 the words are "fit out *and* arm." It is true the section proceeds, "or be concerned in furnishing, fitting out, *or* arming;" but clearly that means, be concerned in any part of the whole offence. There must be a fitting out *and* arming for any person to be concerned in either. It is absurd to suppose that the statute should make it an offence to fit out *and* arm, and also an offence, and an equal offence, to be *concerned* in fitting out where there was to be no arming. Besides, the same words apply to each matter, viz., with intent, &c. Further, section 10 of the American statute only applies where the ship is built for warlike purposes, *and* the cargo principally consists of arms and munitions of war, *and* the number of men or other circumstances render it probable that such ship is intended to be employed by the *owner* to commit hostilities, &c. It is clear that the bond to be given under these sections could not be required in the case of the "*Alexandra*" until she was armed or had a cargo principally arms and munitions of war.

So, again, if we look at the rights and the obligations created by international law, if a hostile expedition, fitted out by a state, leaves its territory to attack another state, it is war; so, also, if the expedition is fitted out, not by the state, but with its sufferance, by a part of its subjects or strangers within its territories, it is war, at least at the option of the assailed. They would be entitled to say, Either you can prevent this or you cannot; in the former case it is your act and is war, in the latter case in self-defence we must attack your territory whence this assault on us proceeds

And this is equally true, whether the state assailed is at war or at peace with all the world.

JUDGMENT.

The right, in peace or war, is not to be attacked from the territory of another state, that that territory shall not be the basis of hostilities. But there is no international law forbidding the supply of contraband of war; and an unarmed vessel is, in my judgment, that and nothing more. It may leave the neutral territory under the same conditions as the materials of which it is made might do so. The state interested in stopping it must stop it as it would other contraband of war, viz., on the high seas.

I have hitherto considered the case independently of the authorities. They are exclusively American on the American statutes. I concur in the eulogium which the Attorney General passed on American legislation and American judges in this matter. An English lawyer must rejoice to see that those who administer in America a law, in great part our common inheritance, administer it on the same fearless and honest principles as those on which I venture to say law is administered here. The way to show our sense of their example is, not to consider what would be acceptable to their countrymen merely, and decide accordingly, nor to be influenced by the foolish threats which have been uttered, but to decide, as their judges have done, truly and honestly to the best of our ability.

Now there are but three decisions to be noticed. The first is the case of the "*Independencia*." It has not the slightest bearing on the present case. The "*Independencia*" was an armed vessel. Being so, she came to Baltimore, and there had her fighting crew increased. Mr. Justice Story expressly states, as a fact found, that the Court is driven to the conclusion "that there was an illegal augmentation of the force of the '*Independencia*' in our ports by a substantial increase of her crew. This renders it wholly unnecessary to enter into an investigation of the question whether there was not also an illegal increase of her armament." As to the "*Altravida*," he says there was "an illegal outfit and an enlistment of her crew within our waters for the purposes of war." He decides then on the ground of warlike equipment in the American port. I doubt if Mr. Jones was right when he cited this case to show that it was not an authority against him.

Another case is that before Chief Justice Marshall. If a precedent of honest and eloquent indignation was wanted, I would refer to his judgment, but the case itself, like the other, has no bearing on the present. The vessel was "completely fitted in our ports for military operations;" she could have fought at the moment of leaving Baltimore. She might have been subject to the penalties of piracy, but she was not the less equipped and armed for war.

The next case is the *United States v. Quincy*. I say, with all respect, that the case was wrongly decided. The learned Attorney General confessed it. It supposes that a person can assist in doing what nobody is doing or trying to do. It applies

## JUDGMENT.

a pleading test, which is of very little use in discussing a statute, and doubly misapplies it. First. It is not enough to use the words of a statute in an indictment, where, from their position in the statute, they would have a different meaning to what they would have standing alone. Secondly. The objection is misunderstood. Supposing it taken to the indictment it would be, that the indictment should have said, "A was fitting *and* arming, or "attempting to fit *and* arm, and the defendant was assisting to "fit." Further, this case does not say that if the principal in the transaction were indicted, anything less than a warlike equipment would suffice; and that is the only question before us.

These authorities, to my mind, if anything, are in support of that view of international law and of the statutes which I have expressed. The history of our statute, the history of the American statute, the duties of international law, and the speeches and acts of jurists and of statesmen, all point to the same conclusion. A like opinion was recently indicated in an important official statement, in which it was said that "England was preventing the departure of hostile expeditions from her shores." This, whether a correct statement in point of fact, I know not; but it is by implication a correct statement of what she is bound to do by international law, and what she has power to do by municipal law.

I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment, that equipment may leave in another vessel, and be transferred to her as soon as the neutral limit is passed, or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal Act evaded. But as the law stands, or as both laws stand, I see no remedy. I do not see what line can be drawn but the sharp line which Sir Hugh Cairns stated. If it is unlawful to put a peaceful equipment on a ship, because at three miles from the neutral territory she is meant to receive a warlike equipment, why is it not unlawful if the distance is to be a thousand miles, or in this case one of the southern ports? If she may not sail peacefully equipped to a southern port, why would it be lawful to send there her parts ready to be put together? If not those, why the materials of which they could be made, and so on? I am aware, of course, that it would be easy to draw a line and make a law prohibiting the sending forth of a ship, and permitting the exportation of its parts, leaving that to be dealt with as contraband of war, and that such a law would make a broader distinction between what would and what would not be lawful than now exists, and that its evasion by sending forth the parts of a ship would be more difficult and less hurtful and irritating to the opposing belligerent. Whether such a law would be desirable I do not presume to suggest. What I wish is to show that in considering this as a matter of principle, I have borne in mind, first, that the present law is capable of easy and mischievous evasion; and secondly, that if it

is sought to extend it by construction, it is impossible to stop short of the prohibition of the export of contraband of war generally; though, thirdly, a positive law so stopping would not be difficult of enactment.

JUDGMENT.

An argument which I have partly dealt with already has been used (not indeed before us), that there may be an attempting or assisting by persons who do not commit the complete offence of equipping or arming. So there may; but there can only be an attempt to commit an offence where, if the attempt succeeded, the offence would be committed. A person can only assist in doing an act where the act is to be done. Now, there is one thing in this section clear beyond doubt, viz., that there can be no offence against it unless that offence is committed within the Queen's dominions; that therefore, no one can attempt contrary to the provisions of this Act, unless the equipment attempted be meant to be done in the Queen's dominions; and that no one can assist contrary to those provisions, unless some one is equipping or attempting to equip within the Queen's dominions. This was admitted by the Attorney General, and indeed is to my mind too plain for argument.

Taking this view of the statute, I think that a right direction to the jury would be, If you are satisfied that the parties concerned were equipping or arming, or attempting to do so, the ship claimed, with intent that it should be employed in the service of a foreign prince to cruise or commit hostilities against others as alleged, find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities otherwise find for the claimant.

Holding this opinion, I think that the direction of the Lord Chief Baron was substantially, if not verbally, correct. Still, in considering whether the jury came to a wrong conclusion, whether the verdict was against evidence or otherwise unsatisfactory, all that his Lordship said must be taken into account, and though the proceeding is penal, if there had been any evidence on which the jury could have acted, I should have thought that there ought to be a new trial, considering that the defendants kept out of the box witnesses who must have known what the truth was. But interpreting the statute as I do, I think that the verdict was right. I have no doubt that the vessel was building and equipping for the Confederates, and in order that they might use her, when armed and equipped, for hostilities against the Federals. This was being attempted, but I see no evidence that it was intended to arm or equip her in the Queen's dominions so as to be capable of attack or defence. On the contrary, I believe it was intended to evade, not infringe, the statute, not to commit a misdemeanor, nor to do or attempt to do what would cause a forfeiture of the ship. I believe on the evidence that it was intended to deal with this vessel as with the "Alabama," namely, to get her out of the country, and give her her warlike equipment and armament out of the Queen's do-

## JUDGMENT.

minions. It is worthy of remark that the information does not suggest that it was intended to arm her here. I think, therefore, that this other ground for a new trial fails, and that the direction was right, and that on a right direction the verdict for the defendants was right on the evidence, and consequently that the rule should be discharged.

## MR. BARON CHANNELL.

THIS was an information filed by Her Majesty's Attorney General, insisting upon the forfeiture of a ship called the "Alexandra" under the provisions of the 7th section of the Foreign Enlistment Act.

That section makes certain acts done with respect to a ship misdemeanors. It then proceeds to say that "every such ship or vessel shall be forfeited and may be seized," as therein provided for.

In the present case a seizure has been made, and this seizure had to be justified by the Crown at the trial of the information before the learned Lord Chief Baron. Upon that trial a verdict was given for the defendants, and the learned Attorney General in last term obtained a Rule Nisi for a new trial upon five grounds.

Those five grounds may be ranged under two heads, viz., those of misdirection, and of the verdict being against the evidence.

The question as to the verdict being against the evidence necessarily depends in some degree upon the question whether there was misdirection or not, because we must see clearly what were the questions which the jury had to decide before we can apply the evidence and see whether it supports the finding of the jury. The consideration of the evidence would, therefore, whatever view I were to take on the question of misdirection, come more appropriately after than before the consideration of the construction of the statute. But it will be unnecessary for me further to revert to the question of the verdict being against evidence, in the view which, after much anxious consideration, I feel compelled to take of the construction of the statute, and of the effect of the Lord Chief Baron's direction,—a view which differs in some respects from the opinions of the Lord Chief Baron and of my brother Bramwell, and leads me to a different conclusion to that at which they have arrived, and which, for that reason, and on account of the great respect which I always have for their opinions, I express with the utmost diffidence.

Now, under the head of misdirection, I include an inadequate direction, and also a direction which, though right in the main, would be calculated to mislead a jury. Where the question turns upon the construction of an Act of Parliament, the judge is, I think, called upon to explain to the jury the sense in which any doubtful word or expression in the Act is to be understood. See *Elliott v. the South Devon Railway Company*, 2nd Exchequer Reports, p. 725.

In the consideration of the question of misdirection it will be convenient, first, to endeavour to construe the Act and see what

direction ought to have been given, and then to consider whether the direction given agrees in substance with what ought to have been given.

JUDGMENT.

The Foreign Enlistment Act, particularly the 7th section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appear to me to be important variations, penned from an Act of the United States passed in Congress, first in the year 1794, and re-enacted by Congress in the year 1818.

This circumstance has given rise to a great deal of argument on both sides. Sir Hugh Cairns has suggested, apart from the language of the Acts of Congress, certain *à priori* views tending to show why the American Act was passed and altered; and then, treating the Acts of Congress as with some exceptions identical with our own, he seeks to apply certain decisions in the Courts of America to the consideration and construction of our own statute. Into this very wide field of inquiry he has constrained the counsel for the Crown to follow him, and they have done so in the very order in which his argument was addressed to us. I do not say that any time was lost, or that in the course of the very long argument that was addressed to us any view was submitted not calculated to assist the Court; but, having carefully considered the arguments, I cannot help thinking that the decision of this most important question should proceed on grounds less wide than those to which the attention of the Court has been so ably called.

Faulty and imperfect as may be the wording of the 7th section of the Foreign Enlistment Act (and more imperfect or faulty wording I can scarcely conceive), if, notwithstanding all this, the words of the 7th section read with reference to the other part of the Act do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the "Alexandra," then in my judgment it scarcely becomes necessary to consider what have been the decisions of the Courts in America upon Acts of Congress in the main much the same, but, in not unimportant respects, different from our own Act.

Whether for the present purpose the Foreign Enlistment Act is to be considered as a penal statute, the Crown in this case proceeding for a forfeiture of the ship, or is to be considered as an Act for the first time creating a criminal offence, the rule to be applied in order to its construction is that which is so well expressed in the passage from the late Mr. Sedgwick's treatise quoted by my brother Bramwell, and to which passage I need not advert in detail; but I may say that it deserves, in my judgment, the high eulogium which my brother Bramwell has passed upon it, and is, I think, in perfect accordance with the American and English authorities which that late learned writer has cited in support of his view.

Now, faulty and imperfect as the wording of our statute, particularly the 7th section, is, there are certain matters clear enough, in my judgment, to be beyond all reasonable doubt. First, the statute is not a statute passed either merely to define what shall be an offence, or to create an offence for the first time and to

## JUDGMENT.

minions. It is worthy of remark that the information does not suggest that it was intended to arm her here. I think, therefore, that this other ground for a new trial fails, and that the direction was right, and that on a right direction the verdict for the defendants was right on the evidence, and consequently that the rule should be discharged.

## MR. BARON CHANNELL.

THIS was an information filed by Her Majesty's Attorney General, insisting upon the forfeiture of a ship called the "Alexandra" under the provisions of the 7th section of the Foreign Enlistment Act.

That section makes certain acts done with respect to a ship misdemeanors. It then proceeds to say that "every such ship or vessel shall be forfeited and may be seized," as therein provided for.

In the present case a seizure has been made, and this seizure had to be justified by the Crown at the trial of the information before the learned Lord Chief Baron. Upon that trial a verdict was given for the defendants, and the learned Attorney General in last term obtained a Rule Nisi for a new trial upon five grounds.

Those five grounds may be ranged under two heads, viz., those of misdirection, and of the verdict being against the evidence.

The question as to the verdict being against the evidence necessarily depends in some degree upon the question whether there was misdirection or not, because we must see clearly what were the questions which the jury had to decide before we can apply the evidence and see whether it supports the finding of the jury. The consideration of the evidence would, therefore, whatever view I were to take on the question of misdirection, come more appropriately after than before the consideration of the construction of the statute. But it will be unnecessary for me further to revert to the question of the verdict being against evidence; in the view which, after much anxious consideration, I feel compelled to take of the construction of the statute, and of the effect of the Lord Chief Baron's direction,—a view which differs in some respects from the opinions of the Lord Chief Baron and of my brother Bramwell, and leads me to a different conclusion to that at which they have arrived, and which, for that reason, and on account of the great respect which I always have for their opinions, I express with the utmost diffidence.

Now, under the head of misdirection, I include an inadequate direction, and also a direction which, though right in the main, would be calculated to mislead a jury. Where the question turns upon the construction of an Act of Parliament, the judge is, I think, called upon to explain to the jury the sense in which any doubtful word or expression in the Act is to be understood. See *Elliott v. the South Devon Railway Company*, 2nd Exchequer Reports, p. 725.

In the consideration of the question of misdirection it will be convenient, first, to endeavour to construe the Act and see what



direction ought to have been given, and then to consider whether the direction given agrees in substance with what ought to have been given.

JUDGMENT.

The Foreign Enlistment Act, particularly the 7th section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appear to me to be important variations, penned from an Act of the United States passed in Congress, first in the year 1794, and re-enacted by Congress in the year 1818.

This circumstance has given rise to a great deal of argument on both sides. Sir Hugh Cairns has suggested, apart from the language of the Acts of Congress, certain *à priori* views tending to show why the American Act was passed and altered; and then, treating the Acts of Congress as with some exceptions identical with our own, he seeks to apply certain decisions in the Courts of America to the consideration and construction of our own statute. Into this very wide field of inquiry he has constrained the counsel for the Crown to follow him, and they have done so in the very order in which his argument was addressed to us. I do not say that any time was lost, or that in the course of the very long argument that was addressed to us any view was submitted not calculated to assist the Court; but, having carefully considered the arguments, I cannot help thinking that the decision of this most important question should proceed on grounds less wide than those to which the attention of the Court has been so ably called.

Faulty and imperfect as may be the wording of the 7th section of the Foreign Enlistment Act (and more imperfect or faulty wording I can scarcely conceive), if, notwithstanding all this, the words of the 7th section read with reference to the other part of the Act do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the "Alexandra," then in my judgment it scarcely becomes necessary to consider what have been the decisions of the Courts in America upon Acts of Congress in the main much the same, but, in not unimportant respects, different from our own Act.

Whether for the present purpose the Foreign Enlistment Act is to be considered as a penal statute, the Crown in this case proceeding for a forfeiture of the ship, or is to be considered as an Act for the first time creating a criminal offence, the rule to be applied in order to its construction is that which is so well expressed in the passage from the late Mr. Sedgwick's treatise quoted by my brother Bramwell, and to which passage I need not advert in detail; but I may say that it deserves, in my judgment, the high eulogium which my brother Bramwell has passed upon it, and is, I think, in perfect accordance with the American and English authorities which that late learned writer has cited in support of his view.

Now, faulty and imperfect as the wording of our statute, particularly the 7th section, is, there are certain matters clear enough, in my judgment, to be beyond all reasonable doubt. First, the statute is not a statute passed either merely to define what shall be an offence, or to create an offence for the first time and to

## JUDGMENT.

define its punishment, but it is in its express intent an Act aimed at the prevention of the offence, not at punishment merely. It is, therefore, in every sense, a remedial statute. And secondly, it is a statute intended to remedy a mischief, which, though forcibly expressed, is only contingent and *possible*, and not *certain*. The language of the preamble points to certain acts which *may* be prejudicial to and *tend* to endanger the peace and welfare of the kingdom; and further, it goes on to recite that the laws in force are not sufficiently effectual for preventing the same. The statute has not, therefore, for its object solely the prevention of acts which, if done, *must* endanger the peace of the kingdom, but appears from the preamble to be aimed also at acts which *may* possibly excite such feelings in other nations as will have that effect. This inclines me to think that the equipment of ships to be employed at a future time for war, though not so complete in this country that the ship shall be at once able to commit hostilities, may be within the Act.

I do not, of course, come to any conclusion from the preamble alone that such an equipment is prohibited; what we have to look at are the enacting words, but I think that the preamble is, as Lord Coke calls it, a key to unlock the meaning of the Act where it is doubtfully expressed; and I concur in the decisions which determine that the words of an enacting clause shall not be cut down or restricted by the preamble.

So that if the case which I have mentioned were clearly within the words of the 7th section, but not within the mischief as declared by the preamble, I should hold that it was prohibited by the Act. As my brother Bramwell has remarked, the Legislature often finds it necessary, in order to restrain certain acts, to prohibit other acts under colour of which the acts to be restrained may be done.

Now this Act has clearly two distinct and several objects in view. The first is the enlisting or engagement without licence of British subjects to serve in foreign service. There I agree that the statute extends to the whole world, provided the persons enlisting or engaging are British subjects. The second object is, the fitting out or equipping in British dominions of vessels for warlike purposes. The part of the Act which relates to the second of these objects includes all persons, whether British subjects or not, provided the offence prohibited by the Act is committed within the Queen's dominions.

I am not insensible to the value of the arguments which have been addressed to us by the counsel for the claimants founded on these different objects. These arguments raise one of the many difficulties in the case. They do not, however, seriously affect my view as to the conclusion to which we ought to arrive. Prohibition and prevention of a mischief which may be prejudicial to and tend to endanger the peace and welfare of the kingdom were, as I have said, aimed at by the statute. By municipal law every one, whether a British subject or not, being within the dominions of our Sovereign, and claiming the protection

of the Government of this country, may be bound. Out of her dominions the municipal law of this country can only bind the subjects of the realm. JUDGMENT.

We ought not to lose sight of the first object contemplated by the Act and provided for by the first six sections. But it is the part of the Act which relates to the second object that principally requires our attention. That last part of the Act, beginning at the 7th section, does by that section provide against equipping vessels with a certain intent, issuing or delivering any commissions for ships with the intent therein mentioned, and lastly for the forfeiture of the ship or vessel. I have said that the forfeiture clause following the clause creating certain misdemeanors applies to "every such ship." This is certainly rather clumsily expressed, but we must take it that every ship is forfeited with respect to which any of these misdemeanors have been committed.

We have, therefore, to see what are the misdemeanors created. They are, first, Equipping, fitting out, furnishing, or arming a ship with a certain intent or purpose. Secondly, Attempting or endeavouring to equip, &c., with the same intent. Thirdly, Procuring to be equipped, &c., with that intent; and fourthly, Aiding, assisting, or being concerned in equipping, &c., with that intent.

Now it is, I believe, the unanimous opinion of the Court, that the second, third, and fourth of the offences here spoken of mean respectively the attempting, the procuring, and the assisting in such an equipment as is spoken of in the first, that is to say, that the secondary offences, as they have been called, are the attempting, &c., such an equipment as if completed would amount to the principal offence. If, therefore, we can arrive at any clear conclusion as to what is the principal offence, the question whether there was any attempt, &c. to commit that offence becomes a mere question of evidence. This being clearly understood, we may, for the purpose of construing the Act, disregard all the words about attempting, &c., and aiding, and being concerned in, and so on.

We have, therefore, now reduced the main question in the case to this, What did the Legislature mean by the words "equip, furnish, fit out, or arm a vessel with intent or in order that she should be employed in the service of a foreign power as a transport or store ship, or with intent to cruise or commit hostilities against a power with whom we are not at war?" Arming is not charged in the present information; we may therefore leave out the words "or arm." The words "transport or store ship" are also immaterial, now that the 97th and 98th counts charging the "Alexandra" to be a transport or store ship are abandoned, except, always, that we must adopt such an interpretation of the words common to both clauses as they would be capable of bearing when combined with the words "as a transport" as well as when combined with the words "with intent to cruise."

The words "equip," "fit out," and "furnish" seem to me

## JUDGMENT.

to mean nearly the same thing. Throughout the whole course of the argument in this case little stress was laid upon any supposed difference between the words "equip," "fit out," and "furnish." We may therefore still further reduce the words which we have to construe to these, "equip, with intent or in order that the vessel shall be employed in the service of a foreign power with intent to cruise or commit hostilities."

It is admitted, I think, on all sides that these are the words upon which the main question in the case turns. Now it is clear that the offence created by these words is one consisting of an act done with a certain intent or purpose. The act and the intent must both be present to constitute the offence, and the act must be done and the intent must exist within the Queen's dominions.

It is also, I think, agreed on both sides that the intent spoken of must be the intent of some person who has control over the vessel so as to be able to carry out his intent or purpose.

We now come to the points on which there is a difference of opinion. The Attorney General contends that any equipment, however peaceful in its nature, will be an offence against the Act, provided there is an intent that the vessel shall be used at some future time in the service of a belligerent. He admits that where the equipment is clearly peaceful there will be much greater difficulty in proving the intent, but he says, that assuming that you can prove the intent, then any kind of equipment will be within the case contemplated by the Act.

On the other hand, the counsel for the claimants connect more closely the act and the intent, that is to say, they explain the general word "equip" by the subsequent words "with intent or in order that the ship shall be employed" in a given manner, and they say that these words show that the equipment spoken of is an equipment suitable to the employment. Further, I understand them to go the length of saying that it must be suitable only for that employment.

It is remarkable that the words "or in order that" are not in the American Act, but have been added in ours. This will be a subject for remark by-and-by when we come to consider the applicability of the American cases. Now we have only to see what difference these words make. Do they enlarge the scope of the Act by mentioning another case, another kind of equipment which is also within the Act, which in the course of the argument I was much disposed to think was the right view, or do they rather restrict the previous words, explaining them and throwing a light upon them, as suggested by Mr. Mellish? It seems to me now that the latter view is the right one, and that the words "or in order that" restrict and explain what is meant by "with intent" rather than include any new case not before included. If I do an act which is entirely immaterial to the employment of the ship, as painting her name on her stern, I may do that having all the time the *intent* that she shall be employed in a given manner, but I cannot do it *in order that* she may be so

employed, for it has no reference or relation whatever to her employment, and does not further her being employed in one way more than another.

Thus, there may be an equipment "with intent that," which is not an equipment "in order that." But can there be an equipment "in order that," which is not "with intent that?"

The Attorney General has suggested that there *may*, or at all events that the framers of the Act thought there might. He argues that the words were inserted to meet the argument that builders and other tradesmen are not parties to the intent; but, he says, at all events they may be said to do it "in order that." But is it clear that a man can do an act *in order that* a result may follow, without intending that result. Does not every man intend to effect the object of his act? If, however, we do suppose such a case, where a man without having the intent that the ship shall be employed in a given manner, yet equips her in order that she may be so employed, is not the inference as strong as possible that the equipment must in that case be of a nature suitable and appropriate for that employment? It seems then that if we are to give any force to the words "in order that," it must be as explaining and illustrating the words "with intent that."

It may also be remarked that in this information the charge is that certain persons did equip the "Alexandra" "with intent and "in order that," &c. This shows that whoever drew the information supposed the two expressions to mean the same thing. I do not attach much importance to the last remark, for if we ought to decide them to be different, then I think the words "and in "order" in the information might be rejected as surplusage.

It seems, then, on the whole, that in order to justify the seizure the Crown must show an equipment (either completed or attempted) of the "Alexandra," *in order that* she might be employed, &c.; and further, that this necessarily means an equipment enabling, or tending to enable, her to be so employed. This last conclusion I draw also from the nature of the words "equip, "furnish, and fit out."

I do not adopt the idea that any one of these words can include building. The Attorney General at one time seemed disposed to contend that fitting out might include building. I do not think that he adhered to that throughout. If he still holds that opinion, I certainly differ from him upon the point. I do not pretend to say whether any particular act, as for instance fixing the ship's bulwarks, is part of the building or part of the equipping and fitting out. That, I think, might be a question for the jury. I do not even say that acts done to the structure of the vessel may not be equipments. I should say that you were equipping a ship for an arctic expedition by strengthening her framework in order to enable it to resist the pressure of the ice. But, say that equipping, fitting out, and furnishing are all acts subsequent in their nature to the building, and in speaking of which you contemplate the ship as already in existence.

I think there is nothing contradictory to this view in the cases cited by the Attorney General, viz., the *United States v. Guinet*

JUDGMENT. in Wharton's *State Trials*, the ship "Brothers," and the ship "Mermaid," both in Bee's Reports.

What it seems to me that these words "equip, furnish, or fit out" do all signify is this,—contemplating the subject matter of the equipment as already in existence, they express an idea of preparing it for some purpose or another. That purpose may be either expressed or implied. When you speak of "equipping a ship" *simpliciter*, it may be that that means getting her ready for sea, because to go to sea is the natural and ordinary use to which a ship is put. If you state the nature of her employment, then equipping means getting her ready for that employment. I interpret the words, therefore, as showing that the equipment spoken of in the 7th section must, as a matter of fact, be an equipment for the employment spoken of.

If we are left in doubt whether this is the right interpretation or not, I think, as I have said before, that we may and ought to look at the preamble to see the object of the Act. There we find that the mischief to be remedied is one which may arise from the fitting out and equipping and arming of vessels for warlike operations. This then is the very case which I have interpreted the 7th section to strike at, provided that the employment there mentioned is an employment for warlike operations. What is the employment there mentioned? "Shall be employed in the service of a foreign prince with intent to cruise or commit hostilities." It has been assumed in the argument on both sides that this may be read as if the words "with intent" were there omitted, as they are in the American Act. Whether this is right or not, their insertion certainly causes great confusion. In the first place it provokes comparison with the other clause commencing with "with intent," causing one at first sight to read them as showing alternative intents, either of which would, with the requisite act, constitute the offence. This, on looking into it, is agreed on all sides not to be the right construction. But they create a further difficulty. This intent now spoken of is necessarily from the collocation of the words, "shall be employed *with intent*," an intent of the employer, and not of the equipper, which is, as it were, engrafted upon the intent of the equipper; and it is very difficult to see how one man can intend that another man shall intend something or other. It is probably this difficulty which has prevented the counsel on either side from founding any argument upon these words. But for this, I should have thought it might have been argued that an employment with intent to cruise differed from an employment to cruise in this, that it might include an earlier employment, and might cover the voyage in an unarmed state from one port to some port where the vessel was to be armed, and from which she was to start to cruise. But even if I adopt the view taken by the Attorney General that an employment with intent to cruise may be construed the same as an employment to cruise, I think that an equipping, in order that the vessel may be employed to cruise or commit hostilities, means an equipping for warlike purposes. So far then, I think, it is clear that there must be an equip-

ment for war, and that an equipment which cannot be used, and is not useful for war, will not do. The conclusion at which I have so far arrived is drawn from the 7th section, with such light as is thrown upon it by the preamble and by the 2nd and 8th sections. In drawing that conclusion I agree in a great measure with the argument of the claimants, and with the judgment of the Lord Chief Baron and my Brother Bramwell.

JUDGMENT.

But another, and to my mind, very important and difficult question arises. Suppose that there is evidence of some equipment or other, either completed or attempted, but that the equipment does not in itself show whether it is an equipment for war or not, may we take into consideration evidence of the intent to prove that it is actually and in point of fact an equipment for war? Upon this question, after much anxious consideration I have arrived at the conclusion that we may. I do so with the most sincere and respectful deference to the opinions of the Lord Chief Baron and my Brother Bramwell, and with great distrust as to the correctness of my own judgment.

It will be convenient, now that I am about to consider whether the character of the equipment, where doubtful, may be explained by the intent of the parties, to see what effect the clause "as a transport or store ship" has upon the interpretation of the section, because it is especially in the case of a store ship that we see the absolute necessity of explaining the character of the equipment by the intent. Now is there anything which militates against the view, that the equipment with intent or in order that the ship may be employed in a given manner, means an equipment suitable to that employment, in the fact that one of the employments spoken of is "as a transport or store ship?" It may well be that there is no equipment specially suited to a store ship. All equipments of an ordinary merchant vessel may be and probably are suitable to a store ship. But is it any reason for saying that the equipments struck at by the Act are not equipments suitable for a store ship, because being so they would be also equipments for another object? Is a gun the less an equipment for war because it may be used for firing salutes?

But the counsel for the Crown deduce from the case of the store ship, as it seems to me, a very important argument; they say that in that case the jury must necessarily look at the evidence of the intent to enable them to say whether the equipments are for a store ship or not; and if so, why are they not to look at the evidence of intent to say whether certain equipments of a doubtful nature are for warlike purposes or not. I grant at once that they may, provided that the equipments as to which the doubt exists are such as can be directly used for war without further addition. They might of course, if they were in doubt as to whether a gun was an equipment for war, look at the evidence of intent to satisfy themselves that it was not intended to be used simply for firing salutes. But the question is more difficult, supposing that the equipments are such as can only be used for war by some addition being made to them. Suppose a jury to find as a matter

## JUDGMENT.

of fact that a certain vessel is intended to be sent to the West Indies, and then to have guns put on board,—that when her guns are on board, the mainsail with which she has been equipped in Liverpool may assist her in chasing an enemy's vessel; are they then justified in deducing from that, that the mainsail is an equipment in order that she may be employed to cruise? I have, after giving the question my best consideration, come to the conclusion that the jury may so reason. I am supposing a case where an equipment is made which, though not in itself sufficient to make the vessel a war vessel, is still a necessary part of the equipment of a war vessel. It would, as it strikes me, be a question for the jury to consider whether the equipments are in fact equipments for war; and they may decide that question for themselves by the nature of the equipments if they sufficiently show it (in which case they will have to look to the intent and purpose only so far as to see that the vessel is to be employed against a power with whom we are at peace), or they may decide that certain equipments which are capable of being used for war are as a matter of fact equipments for war, on the ground of evidence being laid before them showing an intent so to use them. But if a jury found specially these facts, that A. B. had equipped a vessel which was in its structure capable of being converted into a war vessel to the extent merely of enabling it to sail away from this country; that he knew that the purchaser intended to convert it into a war vessel; but if the jury also distinctly found that what A. B. did to it was done not in order to convert it into a war vessel, or in order to be useful to it when so converted, but simply in order to enable it to reach a port where the purchaser might, if he pleased, convert it; in such a case I do not mean to say that A. B. ought to be convicted of a misdemeanor under this Act. That case would not, I think, be within the Act, because the jury would there in effect find that the intent with which the act was done was a different one from that mentioned in this section. So far then as to what may be called the principal offence.

There remains for consideration the "attempting" and the "aiding and being concerned in," &c. I have said that the attempt must be to do the act which has been made an offence by the previous clause. The equipment attempted must therefore be an equipment in this country, and of the nature which I have described. In this, the counsel on both sides, and all the members of the Court, are agreed. Where an attempt is charged, we contemplate an equipment commenced but interrupted. In that case the jury will certainly have still more difficulty in seeing whether the equipment is an equipment for war, but in my judgment they may so find upon evidence not of the nature of the equipment but of the intent of the parties, provided always that the nature of the equipment so far as it appears is such that it can be employed for warlike purposes. The same rule applies to the assisting and being concerned in equipping. It must, in the opinion of the jury, be an equipment for war, but I think that



their opinion may be formed either from the nature of the equipment or from the intent.

JUDGMENT.

Having arrived at this construction of our Statute, I will refer shortly to the cases cited from the American reports, for the purpose for which, and for which only, I think they ought to be noticed, that is, to see whether there is anything in the opinions of the learned judges of that country, for whose opinions I have the greatest respect, which were delivered in cases to some extent *in pari materia* with the present, which ought to make me pause or review the interpretation I have adopted on looking at the words of our own statute. The cases cited are the cases on the point of what the meaning of equipment is, to which I have already referred; and besides these there are the cases of *The United States v. Quincy* in 6th Peters, and *The United States v. Gooding* in 12th Wheaton's Supreme Court Reports.

In Quincy's case the portion of the decision which is material in our case was this; that it was not necessary that the jury should find that the vessel when she left the United States was armed, or in a condition to commit hostilities, in order to find the defendant guilty. The Court do not say that she need not be equipped for war, but only that she need not be completely equipped. This view then coincides with the view which I have taken of our Act. It may be that some of the other points decided in that case are not very intelligibly reported, or even not accurately decided, but, at any rate, there is nothing decided but what is in accordance with my interpretation of our Act. Even if there had been, I think that the insertion of the words "in order that" in the English Act, words to which I attach a certain importance, and which are not found in the American Act, and the omission in the English Act of any words corresponding with the 10th and 11th sections of the American Act, might cause me to hesitate before acting on the authority of that case. I think that the 10th and 11th sections in the American Act tend to show that the 3rd section in that Act is less restrictive than the 7th section of our own.

The *United States v. Gooding* was the case of a supposed slaver. The Statute, on the construction of which the case turned, was very similar to the Act which we are considering. It was held in the case that it was "an act combined with an intent, and not either separately, which was punishable." It was decided that the equipment need not be a complete equipment, but that a partial equipment was sufficient. There are also words in the decision which would seem to show that the equipment must be an equipment for the purpose of a slave voyage, as a matter of fact, though it might be only a partial one. It is said, "Whether the fitting out be fully adequate for the purposes of a slave voyage may, as matter of presumption, be more or less conclusive, but if the intent of the fitment be to carry on a slave voyage, and the vessel depart on the voyage, and her fitting out is complete as far as the parties deem it necessary for their object, then the Statute reaches the case."

## JUDGMENT.

That seems to me to amount to this, that there must be a fitting out in point of fact for a slave voyage, but either the intent or the nature of the fitting may determine whether it was for that purpose. This agrees with the conclusion to which I have arrived.

I now proceed to consider what questions ought to have been left to the jury. Disregarding any question as to the proper style of the Confederate States, which is no doubt sufficiently laid in the information, the questions, if my views as before explained be right, should have been, 1st. Was there an intent on the part of any one having a controlling power over the "Alexandra," that she should be employed in the service of the Confederate States to cruise or commit hostilities against the United States? 2nd. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3rd. If not equipped, was there an attempt to equip her in a British port in order that she should be so employed? 4th. Or did any one knowingly assist, &c. in such equipment in a British port? I do not, of course, mean to say that the questions should have been left to the jury precisely in the words which I have stated, but I think that in substance these questions should have been put. Now, with great submission, I doubt whether the substance of these questions was so left to the jury that they would be likely to understand rightly the points which they had to decide.

The question finally left to the jury seems to me to be correct as far as it goes. The Lord Chief Baron says, "Was there any intention that in the port of Liverpool or any other port she should be equipped, furnished, fitted out, or armed with the intention of taking part in any contest?" That I think, so far as it went, was right; but in my opinion it ought to have been accompanied by some further explanation than was given of the words "equip, &c. in order that." Further, I think the jury ought to have been directed that they might form their opinion as to whether she was to be equipped with the intention of her taking part in any contest, either from the nature of the equipment or from any evidence before them as to the intention of the parties with respect to such equipment if they thought it *ancipitis usus*. I think further that though there may have been no equipment completed, the question whether there was an attempt at such an equipment as would, if completed, have been within the Act, should have been distinctly left to the jury. This was not left to them as a separate question, though it may have been, and on the whole I think was included in the question, "Was there any intention that she should be equipped," &c. It has been contended by the Crown, that besides these objections to the sufficiency of the summing up, there are other expressions in it calculated to mislead the jury. The Lord Chief Baron remarked in strong terms upon the analogy of selling gunpowder and other articles, in short whatever can be used in war for the destruction of human beings, to a belligerent, and concluded this

part of his observations with the words, "Why should ships be an exception?" adding, that in his opinion in point of law they were not. The question "Why should ships be an exception?" is repeated in another part. Now if these observations were understood by the jury to apply to a state of things existing under the provisions of or with reference to international law alone, and quite irrespective of any municipal law, they would be, I think, unobjectionable; but they were in my humble judgment calculated to mislead a jury unless attention was distinctly drawn to the fact that this Statute, whatever be its true construction, does certainly place equipped ships in a different position to other contraband of war.

JUDGMENT.

The Chief Baron again used expressions which it is said may have led the jury to understand him as drawing a distinction between equipping without an order, and equipping in obedience to an order, instead of distinguishing between equipping and building, which I now understand to be the meaning he attributes to the words with respect to which this complaint is made; and it is a meaning which I think they may fairly bear, and would necessarily bear if the clauses were inverted, as was suggested by me in the course of the argument, and as I understood was assented to by the learned Attorney General.

Again, the Lord Chief Baron having stated that a man may sell an armed ship to a belligerent if he has it ready, which is I think correct, proceeds, as I understand, to draw from that a conclusion that he may make one to order; and possibly he may *build* a ship, but he may not equip it in order that it may be employed for war. Now if the Lord Chief Baron is to be understood as saying that a man may make to order the same kind of vessel as he may sell when he has it ready, that is to say, a vessel equipped and armed, then such a direction in my opinion would be erroneous; and I cannot help thinking that a jury would understand the Lord Chief Baron to mean that.

Again, the Lord Chief Baron said that he would not leave to the jury the question of what service the vessel was intended for. This I think should have been put. It may be that the Lord Chief Baron thought, not that it did not arise or become material in any event, but that it might be assumed in favour of the Crown as the facts were in evidence, for he proceeded to say that the question was whether the vessel was built or in the course of building. If the jury thought, as the Lord Chief Baron seems to have thought, that the ship was not completely built, and therefore no equipment or fitting out could have been even commenced, the question of intent would not arise. But that was a question for the jury; and it was only in the event of their finding that question in one way, that the question of the service for which the vessel was intended became immaterial.

Further, it is complained that the Lord Chief Baron directed the jury that equipping, fitting out, and furnishing all meant the same as arming. This we now understand him to say he did not do, but only expressed his opinion that they did.

## JUDGMENT.

It is clear, however, that the learned Lord Chief Baron did not direct the attention of the jury to the point whether there was an equipment (completed or attempted) of a character doubtful in itself, but still capable of being used for war, which was to their satisfaction established to be an equipment for war by the evidence of the intent of the parties. And this, I think, should have been left.

I adopt the proposition stated by the counsel for the Crown, that a summing up which, fairly considered, has on the whole a tendency to mislead a jury upon a question of law, on which they ought to be guided by the opinion of the Judge and not to form their own opinion, is open to the objection of misdirection.

As was remarked by the Attorney General in his able argument, the learned Lord Chief Baron was obliged to deal on the trial with a difficult subject, and, as was said by the Attorney General, it is not wonderful if in some things his Lordship may have omitted to have made observations which he would have made, or may have made observations which he would not have made, had it been otherwise. Yet, I am not prepared to say that I find in the summing-up of the Lord Chief Baron, delivered as it was under these circumstances of difficulty, any statement of law which is in my judgment absolutely erroneous. But it does seem to me that the explanation given of an extremely difficult and obscure Act of Parliament was not so full or so clear as a jury ought to have had in a case of so great importance, and certainly not so full as the jury will have if a new trial is granted, now that the whole subject has been so amply and so ably discussed. I think also that there are expressions in the summing-up which a jury would probably have misunderstood; so that, on the whole, I think we ought to grant a new trial on the ground of misdirection, including, as I do in that term, inadequate direction, and expressions calculated to mislead the jury.

Taking this view, I need not revert to the question whether the verdict was against evidence; or whether, supposing it to be so, the present case ought to be assimilated to a penal action, in which case the rule is that a new trial is never granted *solely* on the ground that the verdict is against the evidence. I expressly refrain from offering any opinion whether the verdict found by the jury in this case was or was not in my judgment the right one. But I say that it was an unsatisfactory verdict, because it may have proceeded upon a misapprehension of the law and of the questions to be decided.

It is a satisfaction to me to find that my Brother Pigott has arrived, in the result, at the same conclusion with myself, although his reasons for doing so may not be entirely the same as my own. It is also a satisfaction to me to know that although I differ from the Lord Chief Baron and my Brother Bramwell in the result, there are many broad points of agreement between us. I agree with them in thinking that what this Statute forbids is an equipment for war. I agree with them in thinking that the main object of the Statute was to prevent our ports being made stations

of hostilities. Our difference appears to be this, that they think the equipment must be intended to be completed so that the vessel when it leaves our port shall be in a condition at once to commit hostilities; whilst it seems to me that in the fair and reasonable meaning of the words used, another case is included, viz., where the equipment not being complete to that extent is yet capable of being used for war, and the intent is clear that it is to be used for war. I say that the fair and reasonable meaning of the words includes that case, and that we should judicially construe the Act to include it.

JUDGMENT.

It may be said that the manner in which I have considered this case, by a minute scrutiny of the words of the Act, is a mere lawyer's method of viewing the matter—that in a case of this kind it is our duty to take a broader view—to take into our consideration the principles of international law, the duties of nation to nation, and even the opinions of great statesmen on those duties. I, for my part, have no ambition to decide cases in this Court in any other capacity than that of a lawyer. In days long past judges, I think, often invaded what we now consider the sole province of the Legislature. They interpreted statutes to include cases which they assumed to think ought to have been included; thus not merely constituting themselves legislators, but generally also legislators *ex post facto*. That I think will never be done again. As long as Acts of Parliament are drawn as they are now, the office of construing them will be no sinecure, though we have but to interpret the law, and not to make it. If it is for the interest of the nation that the law should be other than we interpret it,—if our construction of this Act of Parliament may endanger the peace of the nation,—then I say that it may be the duty of Parliament to enact a new law; but it is not our duty to look elsewhere than at the present statute for an interpretation of it.

#### MR. BARON PIGOTT.

THE rule for a new trial in this case has been drawn up on seven different grounds. We have, however, to consider them as practically reduced to two, and accordingly the arguments were directed to impeach the general verdict which was found for the claimants of the ship, the “Alexandra,” first, upon the ground that the Lord Chief Baron had misdirected, or had insufficiently directed the jury in point of law, and, secondly, that the verdict was against the weight of evidence.

The material facts disclosed in evidence on the trial were, that the vessel, the “Alexandra,” was built by Messrs. Miller, who stated that she was for Messrs. Fraser, Trenholm, and Co., agents of the Southern Confederacy; that she was launched in March, and at the time of the seizure, on the 5th of April, the defendants' workmen were variously engaged in fitting her with stanchions for hammock nettings; that her three masts were up, and had lightning conductors on them; that she was provided with a cooking apparatus sufficient for 150 or 200 people; that her build

## JUDGMENT.

was apparently for a gun-boat with low bulwarks, over which pivot guns could play; and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial, as upon the argument before us, was that upon the true construction of the 7th section of the statute, the Foreign Enlistment Act, the evidence disclosed no illegal act done or attempted in reference to this vessel which worked its forfeiture.

The Lord Chief Baron's direction to the jury is before us at full length, and I proceed to consider the objection to its sufficiency, and the arguments which were addressed to the Court thereupon. It is clear that the construction of a statute is for the Judge, and there are no doubt many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence, not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the Judge to give the necessary explanation, and to evolve the question of fact which the jury are to decide. The statute in question is, in my opinion, clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly understand the issues of fact which they had to try. In order to determine this it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the Court to guide us in our decision.

As to one class of these arguments, I felt great doubt whether they could be legitimately addressed to us for the purpose of expounding a municipal statute; and certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians.

But a second class of argument was founded on the state of international obligations as between neutral and belligerent nations, and which it was argued the Legislature, by the 7th section, intended to enforce upon the subjects of the Crown.

This argument necessarily embraced a very wide field, and no doubt those obligations are the foundation of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral state so long as it is not affected by hostile acts, or until aid be in some way actually afforded to its

adversary; but the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *a priori* that such would be the course adopted. Be this as it may, the consideration of the subject can for the present purpose be serviceable at the utmost where the language employed in legislation is in itself really ambiguous, and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that, to some extent, the latter go beyond them.

JUDGMENT.

A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it had the same general object, is framed *in pari materia*, and was the forerunner of our statute. In these circumstances I see no objection to making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English legislature can be more certainly ascertained. And in the same way the authorities of the American courts may serve to guide, though not to govern, our judgments. Now with reference to the corresponding section of the American Act, as compared with the 7th section of the English Statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our legislature has made very material variations from it. Of these the very prominent ones are the use in the English Statute of the disjunctive for the conjunctive, the extending of the prohibition to equipping transports or store ships, the addition of the words "or in order," to "with intent," and the omission in the forfeiture clause of the materials for building the ship,—alterations which can only have been made with some object at least.

As regards the American authorities, the case of the United States *v.* Quincy, in 6th Peters' Reports, is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the Court is exactly in point. But it does nevertheless appear from several parts of the judgment that the Court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the preparations were made;" and again, "It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character." From this and other passages in the judgment I infer that they were disposed to disregard altogether the nature of the preparations.

JUDGMENT.

I pass now, however, to the head of argument addressed to us by both sides, and on which, in my opinion, the judgment of the Court must be mainly based, viz., on an examination of the statute itself, its object, preamble, and enacting language; and I own that, were it not for the great difference of opinion which seems to exist, I should not have thought it so difficult to construe as it would thence appear to be. It is a municipal Act, and is to be construed according to the ordinary import of the language employed. This was the rule of construction stated by Baron Parke in *Lyde v. Barnard*. The rule of construction is also clearly stated in the *Sussex Peerage* case, by Chief Justice Tindal; thus, "If the words are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; the words themselves do in such case best declare the intention of the lawgiver." And I confess I approve, as applicable to this statute (as to the character of which I agree with the remarks made by my Brother Channell, though I say it now with deference after the Lord Chief Baron's observations) of Lord Coke's rule in *Bonham's* case where he says, "The good expositor makes every sentence have its operation to suppress all the mischiefs; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous nor makes exposition against express words."

Bearing in mind these rules of exposition, I find that the Foreign Enlistment Act plainly recites the mischief, and the cause of it which it is designed to prevent, viz., "The fitting out and equipping and arming of vessels by Her Majesty's subjects without Her Majesty's licence, for warlike operations, which may be prejudicial to and tend to endanger the peace and welfare of this kingdom." This language is tolerably plain, and I pass on to consider the enacting clause, where the mode of prevention is stated.

The language of it is varied, and as I think in some respects studiously varied from that of the preamble. There is introduced into it the additional word "furnish;" the copulative "and" is changed into the disjunctive "or," to connect the four much debated words, instead of the expression "fitting and equipping and arming of vessels for warlike operations," which is the language of the preamble, the expression is "equipping, furnishing, fitting out, or arming, of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, &c., as a transport or store ship, or with intent to cruise or commit hostilities," &c. It is agreed on all hands that the latter words, "with intent," may be taken as omitted here. The clause is also directed not only against the principal offences stated in the preamble, but also against any attempt to commit them, and also against the knowingly aiding, assisting, or being concerned in them; offences expressly, of course, mentioned for the purpose of the forfeiture. The enacting clause, therefore, is more extensive than the preamble, but I take it to be a clear rule of construction, that where



that is the case effect must nevertheless be given to the larger words of the clause. JUDGMENT.

It would be unnecessarily lengthening my judgment if I attempted to review all the arguments on this part of the case. I shall, therefore, confine myself to noticing some of them, in the course of stating my own views. And first, I do not think that the legislature have used any apt words to prohibit the building a hull of a vessel as contradistinguished from equipping it for sea, and for other purposes. It seems to me that if such had been the intention, it would have been done plainly by the use of the word "build" before the expressions "equip," &c., and that it is impossible for a Court to guess that such might have been the meaning, as was argued by the Attorney General, from the use of so doubtful an expression as that of "fit out," rendered more doubtful for such a purpose by its collocation in the sentence, not standing even in the position which it occupies in the American statute, namely, first, but placed among expressions plainly signifying acts done on a vessel in existence. And when reference is made to the forfeiture clause, it is to be observed that neither the "hull" nor the "building materials" are enumerated there; but, as before observed, the latter words which were to be found in the American Act appear to be studiously omitted, and no equivalent ones are substituted. The subject was one too prominent to have escaped the observation of the framers of the statute, and I am led therefore to infer that the legislature had reasons for not interfering with the shipbuilding trade, as such, in contradistinction to the business of equipping ships. It may have been because of its extent and importance, or the legislature may have hoped to prevent the mischief aimed at by less objectionable means, or (and I think that most probable) it may have considered that ample time would be afforded between the completion of the hull and the equipments necessary to enable it to leave the port, during which its destination being ascertained, if illegal, a seizure could be effected. Whether I am right in these suggestions or not, I find no distinct prohibition against the building of a hull or vessel, and I feel bound, therefore, to say, that by building merely, no forfeiture is incurred. But I am of opinion that any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is expressly within the plain language, and also within the evident spirit of the statute. The intent I take to mean an intent of the principal (who has control of the ship) having directly for its object the employment of the vessel by a foreign state, and in the equipper a like intent, and with such intent a contributory equipment of some kind necessary to such employment, and it is evident that the intents need not be derived solely from the nature of the equipments, but may be proved *aliunde*. It may not be easy to define in all cases the exact point at which the building of the hull ends and the act of equipping or fitting out begins, but that in each case would be for a jury to decide.

## JUDGMENT.

I will now state some reasons for the construction at which I have arrived. I feel bound where the legislature has used different expressions having different meanings, and has coupled them with the disjunctive "or," not to treat them as if they were coupled with the copulative "and," or as merely redundant expressions, unless I am compelled by the context to do so, but to give effect to each of them so far as they will admit of it, unless I thereby find that manifest injustice or absurdity will result. I do not find that in the present case, and I therefore do suppose that the legislature attached different meanings to the several expressions. I further think it impossible to believe that the word "and" in the American statute should have been so pointedly changed to "or" by our legislature without some object.

It was argued that the four expressions are to be construed as *ejusdem generis*; the word "arm" being the distinctive feature. But, in my judgment, the use of so many as four different words can hardly have been meant to express precisely the same thing; and it is obvious that the words "equip, furnish," and "fit out," are used in the section, for some purposes at least, to signify something different from the word "arm." For instance, as applicable to a transport or storeship, they are so used. Then these words being there used, as they must be, to signify peaceful equipments, it would seem a very forced construction to say that they exclude the same meaning when applied to a ship intended to commit hostilities, although that ship equally requires peaceful equipments with a transport or storeship.

But it was urged, and more particularly by Mr. Mellish, that the several expressions may have a several effect given to them, only that their meaning should be restricted to equipments of a distinctive character, according to the nature of the ship; and therefore that a ship intended for war must have warlike equipments.

I think that this construction would in effect be introducing into the statute words that are not to be found there, which is quite as objectionable as striking out words which are there, or it would be changing the collocation of the language for the purpose of forcing its meaning; for it is not said in the statute that those equipments alone are unlawful which shall make the ship fit in all respects for its purpose, whether as a storeship or to commit hostilities; but those equipments are unlawful which are supplied with intent that the ship shall be employed in the service of a foreign state, and then the several services in which it shall not be so employed are enumerated, the service of committing hostilities being only one of them.

Again it is admitted by the claimants' counsel that a complete equipment is not necessary to the violation of the statute, but that a partial one is sufficient, if of the distinctive kind; and further, that as regards a war ship any warlike equipment, even short of arming, is forbidden. The consequence would be that you may not put one gun carriage or gun on board without a violation of

the statute, and yet by such partial warlike equipment the ship would be no more in a position to commit hostilities than she would if she was only peacefully equipped. But it seems to me that a strange result would be produced if we were to hold that the statute intended to prohibit only warlike equipments in a ship of war, founded on the words "equip with intent to commit hostilities," which was Sir Hugh Cairns' argument; for that reasoning would drive us to say that only such warlike equipments are forbidden as would enable the ship to commit hostilities, as was argued in Quincy's case. The consequence would be that this vessel might have its pivot guns on board, and yet no offence be committed against the statute, because without the cannon balls and powder her equipment would still be useless for actually committing hostilities; so that if the intention really were to go out of port equipped with a full armament, but not to receive her ammunition on board until she was out of the English waters, the 7th section would still not be violated.

Again, with reference to the necessity of distinctive equipments, I have not heard that there are any such applicable to a store-ship, except the ordinary peaceful ones which a merchant ship requires. And if the argument of distinctive equipments will not hold as to all the several ships pointed out by the statute, I do not think that I have a right to apply it arbitrarily to one class, viz., to ships equipped with intent to commit hostilities.

As regards the meaning of the several expressions, and the necessity for the use of them in the statute, it may be that the word "equip" in its largest sense would alone have sufficed; but probably an interpretation clause would have been requisite, as it certainly means different things when applied to different subject matters. In Falconer's Marine Dictionary it is defined as "a term frequently applied to the business of fitting a ship for sea or "arming her for war," and I think, therefore, the other expressions may be regarded as in the nature of words of interpretation of the possibly ambiguous expression "equip," and meaning the same as if the words had been a prohibition of equipment, including ships' furniture of all kinds, and arms. But because the word "arm," is added to the others in order fully to express a complete description of the equipments peaceful and warlike of a war vessel, I feel it impossible to say that I ought so to construe the section as to deprive the other expressions, to which it is superadded, of their ordinary meaning. I do not therefore in the result find any reason for this distinctive construction. In my view the prohibited intent is the main ingredient, and any act of equipping done in furtherance of that intent, will constitute the whole offence; for assuming the same intent to be present in two persons, I do not see the difference between the agent who did put on board this ship the cooking apparatus sufficient for 150 or 200 men and fitted the stanchions, and the man who might have put on board a pivot gun to have played over the low bulwarks when ammunition should be supplied by some one afterwards. Both would be acting with a common object, and the

**JUDGMENT.** part contributed by each would equally conduce to the fulfilment of it.

Before I could come to the conclusion contended for by the claimants in the absence of plainer words to that effect, I must believe that the legislature, when enacting a forfeiture and power to arrest a vessel, meant to deprive itself of all reasonable opportunity for exercising that power, and that too when the avowed object is to prevent the vessel leaving the English port, and not merely to punish offenders by indictment afterwards. Upon this restricted construction it is practically plain that the statute would be set at defiance in one of two ways, either as was done by the "Alabama," whose armaments went out in another ship, or by completing the peaceful equipments first, and then putting on board the guns as the last act in port, probably occupying a few hours at most, and giving no opportunity of seizure and prevention. In fine, I see no more reason for saying that the ship must, in order to violate the statute, be so equipped in our ports with arms as to be ready to commit hostilities on leaving them, than for saying that she must be sufficiently manned also, without which she would certainly not be in such a condition. I cannot so restrict the statute by construction without feeling that I should virtually repeal it.

In arriving at my construction I do not feel pressed by Sir Hugh Cairns' argument of inconsistency in drawing so sharp a line between the building and the equipping, for the same might be said of the distinction which does exist between selling an armed vessel to a belligerent and arming one with the requisite intent under an order of the same purchaser; the line is equally sharp, and the only difference is in the place where it is to be drawn. Indeed, this argument is rather to be addressed to the lawgiver than to the expounder, if there be inconsistency in the legislation. Admitting, as I do, that there is inconsistency in the state of this law as to what is lawful and what is not, I believe nevertheless that the lesser amount of inconsistency is incurred by adhering to the ordinary meaning of the language employed as I have above construed it.

Upon this view of the statute, in my opinion, the proper direction to the jury would have been that they should first look to see whether the equippers had had the intention which I have above mentioned, together also with the intent of the principal as explained by my Brother Channell; and, secondly, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted or endeavoured so to do; and I agree with the definition of the attempt which my brethren have given. But looking at the whole of the direction of the Lord Chief Baron (which I need not criticise at length after my Brother Channell's judgment), although his Lordship does appear to have left the question of equipping, furnishing, or fitting out to the jury in the alternative, yet I think there are other passages of the summing up which are inconsistent, and which would have

a tendency to mislead them. I need not recapitulate them, as my Brother Channell has done so at full length, and I therefore conclude by saying that I think that the jury should have been distinctly told that the intent as before defined being established to their satisfaction, any act of equipping in furtherance of such intention would be unlawful within the meaning of the statute.

JUDGMENT.

I am also further of opinion that, even if my construction of the statute be incorrect, and if it ought to be construed as Mr. Mellish contended, that is, as prohibiting only equipments of a distinctive character, yet that upon the evidence above stated there was sufficient upon which to direct the jury that the claimants had supplied distinctive equipments within that meaning of the Act. The evidence to which I allude is the proof of the fitting stanchions for hammock racks and the cooking apparatus for a crew of 150 or 200 people to a war vessel. I do not find that such direction was given, and I am therefore of opinion that, upon the ground of an insufficient direction, there ought to be a new trial.

On the other ground, that the verdict was against the evidence, I agree with my Brother Channell, that it is unnecessary for me to decide it, as I think that the rule should be made absolute on the ground of insufficient direction.

*Mr. Attorney General.*—My Lord, the Court being equally divided in opinion, if it is your Lordship's desire that a judgment should be given, I believe it is necessary that some arrangement should be made for that purpose, that by the consent of one of the judges who has delivered an opinion, the rule should be either discharged or made absolute, otherwise we should have no judgment at all which could be taken anywhere else.

*Lord Chief Baron.*—The officer of the Court,—the Queen's Remembrancer,—says, that according to the practice you would have an appeal either way; but it would, perhaps, be better if there were an apparent judgment of the Court, deciding one way or the other, in order to remove every possible doubt.

*Mr. Baron Pigott.*—Then I will withdraw my judgment.

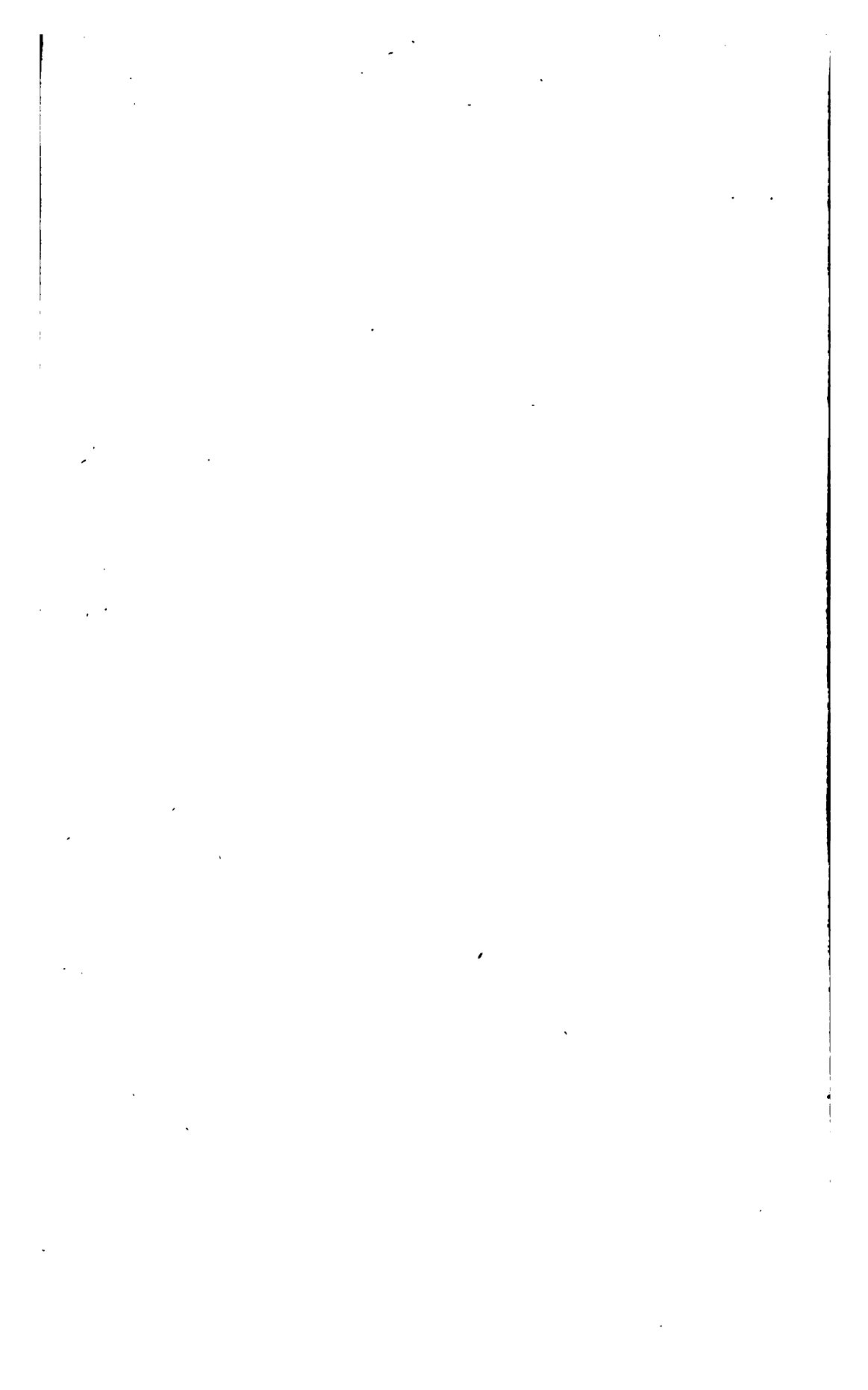
*Mr. Baron Channell.*—According to the rules which the Court made on the opening of this argument, in order to assimilate this case to an ordinary civil action, when a rule for a new trial drops on the ground that the Court is equally divided, there is a right of appeal.

*Lord Chief Baron.*—My Brother Pigott withdraws his judgment.

*Mr. Baron Pigott.*—Yes.

*Lord Chief Baron.*—Then the rule will be discharged.

*Mr. Attorney General.*—That is quite enough, my Lord.



## APPENDIX.

---

LETTER from EARL RUSSELL to the LORDS OF THE TREASURY.

My LORDS,

Foreign Office, January 31, 1862.

HER Majesty being fully determined to observe the duties of neutrality during the existing hostilities between the United States and the States calling themselves "the Confederate States of America," and being, moreover, resolved to prevent, as far as possible, the use of Her Majesty's harbours, ports, and coasts, and the waters within Her Majesty's territorial jurisdiction, in aid of the warlike purposes of either belligerent, has commanded me to communicate to your Lordships, for your guidance, the following rules, which are to be treated and enforced as Her Majesty's Orders and Directions.

Her Majesty is pleased further to command that these rules shall be put in force in the United Kingdom and in the Channel Islands on and after Thursday, the 6th day of February next, and in Her Majesty's territories and possessions beyond the seas six days after the day when the Governor or other chief authority of each of such territories or possessions respectively shall have notified and published the same, stating in such notification that the said rules are to be obeyed by all persons within the same territories and possessions.

I. During the continuance of the present hostilities between the Government of the United States of North America and the States calling themselves "the Confederate States of America," or until Her Majesty shall otherwise order, no ship of war or privateer belonging to either of the belligerents shall be permitted to enter or remain in the port of Nassau, or in any other port, roadstead, or waters of the Bahama Islands, except by special leave of the Lieutenant-Governor of the Bahama Islands, or in case of stress of weather. If any such vessel should enter any such port, roadstead, or waters, by special leave or under stress of weather, the authorities of the place shall require her to put to sea as soon as possible, without permitting her to take in any supplies beyond what may be necessary for her immediate use.

If, at the time when this order is first notified in the Bahama Islands, there shall be any such vessel already within any port, roadstead, or waters of those Islands, the Lieutenant-Governor shall give notice to such vessel to depart, and shall require her to put to sea, within such time as he shall, under the circumstances, consider proper and reasonable. If there shall then be ships of war or privateers belonging to both the said belligerents within

## JUDGMENT.

was apparently for a gun-boat with low bulwarks, over which pivot guns could play; and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial, as upon the argument before us, was that upon the true construction of the 7th section of the statute, the Foreign Enlistment Act, the evidence disclosed no illegal act done or attempted in reference to this vessel which worked its forfeiture.

The Lord Chief Baron's direction to the jury is before us at full length, and I proceed to consider the objection to its sufficiency, and the arguments which were addressed to the Court thereupon. It is clear that the construction of a statute is for the Judge, and there are no doubt many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence, not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the Judge to give the necessary explanation, and to evolve the question of fact which the jury are to decide. The statute in question is, in my opinion, clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly understand the issues of fact which they had to try. In order to determine this it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the Court to guide us in our decision.

As to one class of these arguments, I felt great doubt whether they could be legitimately addressed to us for the purpose of expounding a municipal statute; and certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians.

But a second class of argument was founded on the state of international obligations as between neutral and belligerent nations, and which it was argued the Legislature, by the 7th section, intended to enforce upon the subjects of the Crown.

This argument necessarily embraced a very wide field, and no doubt those obligations are the foundation of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral state so long as it is not affected by hostile acts, or until aid be in some way actually afforded to its



adversary; but the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *a priori* that such would be the course adopted. Be this as it may, the consideration of the subject can for the present purpose be serviceable at the utmost where the language employed in legislation is in itself really ambiguous, and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that, to some extent, the latter go beyond them.

JUDGMENT.

A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it had the same general object, is framed *in pari materia*, and was the forerunner of our statute. In these circumstances I see no objection to making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English legislature can be more certainly ascertained. And in the same way the authorities of the American courts may serve to guide, though not to govern, our judgments. Now with reference to the corresponding section of the American Act, as compared with the 7th section of the English Statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our legislature has made very material variations from it. Of these the very prominent ones are the use in the English Statute of the disjunctive for the conjunctive, the extending of the prohibition to equipping transports or store ships, the addition of the words "or in order," to "with intent," and the omission in the forfeiture clause of the materials for building the ship,—alterations which can only have been made with some object at least.

As regards the American authorities, the case of the United States *v.* Quincy, in 6th Peters' Reports, is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the Court is exactly in point. But it does nevertheless appear from several parts of the judgment that the Court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the preparations were made;" and again, "It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character." From this and other passages in the judgment I infer that they were disposed to disregard altogether the nature of the preparations.

## JUDGMENT.

was apparently for a gun-boat with low bulwarks, over which pivot guns could play; and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial, as upon the argument before us, was that upon the true construction of the 7th section of the statute, the Foreign Enlistment Act, the evidence disclosed no illegal act done or attempted in reference to this vessel which worked its forfeiture.

The Lord Chief Baron's direction to the jury is before us at full length, and I proceed to consider the objection to its sufficiency, and the arguments which were addressed to the Court thereupon. It is clear that the construction of a statute is for the Judge, and there are no doubt many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence, not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the Judge to give the necessary explanation, and to evolve the question of fact which the jury are to decide. The statute in question is, in my opinion, clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly understand the issues of fact which they had to try. In order to determine this it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the Court to guide us in our decision.

As to one class of these arguments, I felt great doubt whether they could be legitimately addressed to us for the purpose of expounding a municipal statute; and certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians.

But a second class of argument was founded on the state of international obligations as between neutral and belligerent nations, and which it was argued the Legislature, by the 7th section, intended to enforce upon the subjects of the Crown.

This argument necessarily embraced a very wide field, and no doubt those obligations are the foundation of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral state so long as it is not affected by hostile acts, or until aid be in some way actually afforded to its

adversary; but the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *a priori* that such would be the course adopted. Be this as it may, the consideration of the subject can for the present purpose be serviceable at the utmost where the language employed in legislation is in itself really ambiguous, and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that, to some extent, the latter go beyond them.

JUDGMENT.

A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it had the same general object, is framed *in pari materiâ*, and was the forerunner of our statute. In these circumstances I see no objection to making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English legislature can be more certainly ascertained. And in the same way the authorities of the American courts may serve to guide, though not to govern, our judgments. Now with reference to the corresponding section of the American Act, as compared with the 7th section of the English Statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our legislature has made very material variations from it. Of these the very prominent ones are the use in the English Statute of the disjunctive for the conjunctive, the extending of the prohibition to equipping transports or store ships, the addition of the words "or in order," to "with intent," and the omission in the forfeiture clause of the materials for building the ship,—alterations which can only have been made with some object at least.

As regards the American authorities, the case of the United States *v.* Quincy, in 6th Peters' Reports, is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the Court is exactly in point. But it does nevertheless appear from several parts of the judgment that the Court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the preparations were made;" and again, "It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character." From this and other passages in the judgment I infer that they were disposed to disregard altogether the nature of the preparations.

## JUDGMENT.

was apparently for a gun-boat with low bulwarks, over which pivot guns could play; and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial, as upon the argument before us, was that upon the true construction of the 7th section of the statute, the Foreign Enlistment Act, the evidence disclosed no illegal act done or attempted in reference to this vessel which worked its forfeiture.

The Lord Chief Baron's direction to the jury is before us at full length, and I proceed to consider the objection to its sufficiency, and the arguments which were addressed to the Court thereupon. It is clear that the construction of a statute is for the Judge, and there are no doubt many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence, not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the Judge to give the necessary explanation, and to evolve the question of fact which the jury are to decide. The statute in question is, in my opinion, clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly understand the issues of fact which they had to try. In order to determine this it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the Court to guide us in our decision.

As to one class of these arguments, I felt great doubt whether they could be legitimately addressed to us for the purpose of expounding a municipal statute; and certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians.

But a second class of argument was founded on the state of international obligations as between neutral and belligerent nations, and which it was argued the Legislature, by the 7th section, intended to enforce upon the subjects of the Crown.

This argument necessarily embraced a very wide field, and no doubt those obligations are the foundation of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral state so long as it is not affected by hostile acts, or until aid be in some way actually afforded to its

adversary; but the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *a priori* that such would be the course adopted. Be this as it may, the consideration of the subject can for the present purpose be serviceable at the utmost where the language employed in legislation is in itself really ambiguous, and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that, to some extent, the latter go beyond them.

JUDGMENT.

A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it had the same general object, is framed *in pari materiâ*, and was the forerunner of our statute. In these circumstances I see no objection to making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English legislature can be more certainly ascertained. And in the same way the authorities of the American courts may serve to guide, though not to govern, our judgments. Now with reference to the corresponding section of the American Act, as compared with the 7th section of the English Statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our legislature has made very material variations from it. Of these the very prominent ones are the use in the English Statute of the disjunctive for the conjunctive, the extending of the prohibition to equipping transports or store ships, the addition of the words "or in order," to "with intent," and the omission in the forfeiture clause of the materials for building the ship,—alterations which can only have been made with some object at least.

As regards the American authorities, the case of the United States *v.* Quincy, in 6th Peters' Reports, is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the Court is exactly in point. But it does nevertheless appear from several parts of the judgment that the Court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the preparations were made;" and again, "It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character." From this and other passages in the judgment I infer that they were disposed to disregard altogether the nature of the preparations.

The  
"ORETO."

"served on board of ocean steamers, in the 'Great Britain' and 'Great Eastern' steamships, and in the Cunard line of boats; there was a great difference in the fitting of the 'Oreto.'"

John Quin, a fireman of the "Oreto," says: "I have been to sea ten years, I have been employed in merchant's steamboats, in passenger vessels, and vessels carrying troops. I never served on board a steam vessel in the merchant service fitted out like the 'Oreto.'"

Charles Ward, the steward of the "Oreto," says: "The 'Oreto' had not the appearance of such merchant vessels as I have been in before. There were shot lockers, and a magazine, gun room, shell room, &c.

"Mr. Lowe was a passenger in her; four or five days after we sailed he came to me and told me to be careful and keep an account of everything, as it would be saving a good deal of trouble when the crew would be leaving, and her guns and ammunition put on board, and a new crew shipped, and very likely everything would be done in a hurry, and he said he would reward me handsomely. I have heard him repeatedly tell the captain to get things done as he wanted them done in the ship, and he was guided by Mr. Lowe on the voyage in the working of the ship and getting things done; this has happened several times. I heard the captain, Mr. Lowe, and the chief engineer speak with regard to the ship. I always understood them to say she was fitted for the Southern Government as a gun boat, whether for the Government or a private gentleman I cannot say—they were conversing in the cabin.

"There was a flag in the captain's cabin, it had one white stripe and two red ones on each side of the white, and in the corner there was blue, with stars in it. I don't know the secession flag. I heard Mr. Lowe tell the captain that he treated the slaves on his plantation better than he (the captain) treated the men. Mr. Lowe stated that he would make a different arrangement when he came to port, and he did.

"I heard Mr. Lowe tell Captain Duguid to get those gun-tackle blocks shipped and put away, not to be used for any purpose at present. This was before we came here."

With respect to this evidence, I will here observe that Charles Ward had been imprisoned by Captain Duguid for some alleged misconduct,—that he gave his evidence evidently under feelings of resentment. Now, when the meaning of any conversation or remark he may have heard depends so much on the *ipseissima verba* which were spoken, the inferences which he may draw from them may be such as their import did not justify, and this evidence must, therefore, be received with great caution. The slightest difference in the words made use of in a conversation or observation, or the occasion which caused it, may give that conversation or remark an entirely different meaning from that which the speaker intended to convey; and it does appear to me rather unlikely that conversation or remark of this nature should

have taken place in the presence of the steward, or in the immediate vicinity of a place, within hearing distance, where he would be very likely to be.

The  
"ORETO."

Captain Duguid has sworn that no conversation as Ward describes took place. Captain Duguid's statement is worth, at least, as much as Ward's; I shall, therefore, not consider these conversations to have been proved. It is true, as was stated by the Advocate General, that Captain Duguid may be an interested witness; to what extent he may be so I do not know, but if the evidence of an interested witness may be legally given, although it should be received with caution, it certainly is not invalidated on that account. Captain Duguid states in his evidence that Ward threatened when he came out of gaol to fix him and the ship too. Ward denies having used this threat, but I am inclined to believe that he did. However, let one assertion be placed against the other; yet I must say that I did not feel at all satisfied with the manner in which Ward gave his evidence. He says: "Mr. Lowe told me to be careful and keep an account of every thing, as it would be saving a good deal of trouble when the crew would be leaving and the guns and the ammunition put on board and a new crew shipped."

Now, allowing that there could be any connexion between the things which a steward would have charge of, and the leaving of the crew, which I do not see, what possible connexion could they have with the shipping of guns and ammunition? I cannot but think it highly improbable that Mr. Lowe would have made so uncalled for, so irrelevant, and, to a stranger, as this steward was to him, so imprudent a speech. Again, he says, Captain Duguid was guided by Mr. Lowe during the voyage in the working of the ship. Can anything be more improbable than this? He says, in another part of his evidence, "I heard Mr. Lowe tell Captain Duguid to get those gun-tackle blocks stopped, and to put them away, not to be used for anything at present. This was before we came here."

This Captain Duguid denies, and, as I said before, Captain Duguid's oath is certainly as much to be relied on as Mr. Ward's.

The observations which I made respecting the Confederate flag when commenting on the evidence of Walter Irving, apply equally to the evidence of Ward, I will only add that I think it very wonderful that he should have been so long, both in Liverpool and here, and not know a Confederate flag.

Captain Hickley, after stating certain motives which induced him to go on board the Oreto, to examine her, gives the following evidence:—

"At noon on the 10th of June I went on board the 'Oreto' with some officers and men, for the purpose of thoroughly examining her, and I found her discharging what I supposed to be shell, at the time of going on board. I should have followed out my intention of thoroughly searching the vessel, but as she was clearing at the time and the consignee assured me that she had cleared in ballast for the

The  
"ORETO."

"Havana, and as I actually thought this was the case,—  
 "this testimony being strengthened by that of the revenue  
 "officer, I thought further interference on my part unnecessary,  
 "and so I quitted the ship." After some few details, to which I  
 do not think it necessary to advert, he goes on to say, "I quitted  
 "the ship with the understanding that I was to again visit her  
 "previous to her leaving; some days elapsed, and being con-  
 "vinced in my own mind that the vessel was not acting in good  
 "faith, I determined before leaving to make a thorough over-  
 "haul; accordingly on the 13th day of June I proceeded on  
 "board with the officers and men chosen, on its being reported  
 "to me that the vessel had cleared in ballast by the consignee.  
 "On my first going over her side, the captain informed me that  
 "the crew had refused to get the anchor up unless they got a  
 "guarantee from myself or the Governor, as to where she was  
 "going; and on the captain calling the crew aft, and requesting  
 "them to state their grievances to me, the men did so in what  
 "I consider an orderly and proper manner, and in no muti-  
 "nous spirit whatever, as far as I am capable of judging. I  
 "then proceeded to examine the vessel, and found her in  
 "every respect fitted as a war vessel, precisely the same  
 "as vessels of a similar class in Her Majesty's Navy. She  
 "has a magazine and light rooms forward, handing room, and  
 "handing scuttle for powder as in war vessels, shell rooms all  
 "fitted as in men-of-war, a regular lower deck with hammock-  
 "hooks, mess shelves, &c. &c., as in our own war vessels; her  
 "cabin accommodations and fittings generally being those as  
 "fitted in vessels of her own class in the Navy. After making  
 "this thorough investigation, I quitted the vessel to make my  
 "report to his Excellency the Governor and the Law Officer of  
 "the Crown. On Sunday the 15th, the boatswain and a portion  
 "of the crew of the 'Oreto' having made reports to me that I  
 "thought made it incumbent on me as a public officer to act  
 "promptly on, I forthwith seized the 'Oreto,' concluding that his  
 "Excellency was in church at the time, and made him acquainted  
 "with it as soon after church as possible. I received a protest that  
 "afternoon, and a letter the following day against, and calling  
 "for an explanation of, my proceedings on behalf of the captain,  
 "on the seizure of Sunday. A correspondence took place between  
 "myself, his Excellency, and the Law Officer of the Crown,  
 "which ended in my releasing the 'Oreto' on Tuesday the 17th;  
 "and on the vessel being released on this occasion, on further  
 "conversation and correspondence with the Governor, it was  
 "deemed necessary finally to detain the vessel for adjudication  
 "in the Vice-Admiralty Court. I found guns on board of her;  
 "she is a vessel capable of carrying guns; she could carry four  
 "broadside guns forward, four aft, and two pivot guns amidships.  
 "Her ports are fitted to ship and unship, port bars cut through  
 "on the upper part to unship also; the construction of her ports  
 "I consider are peculiar to vessels of war; I saw shot boxes all  
 "around her upper deck calculated to receive Armstrong shot,



" or shot similar ; she had breeching bolts and shackles and side-tackle bolts.

" Magazine, shell rooms, and light rooms are entirely at variance with the fittings of merchant ships. She had no accommodation whatever for the stowage of cargo, only stowage for provisions and stores.

" She was in all respects fitted as a vessel of war of her class in H. M. Navy."

In the cross-examination Captain Hickley says the opinions of the Governor and the Law Officer of the Crown, were to the effect that the vessel was *not* liable to seizure ; this was *after* my report of the 13th, after I had made my first examination with the exception of clearing the holds. "The reason I considered she was acting in bad faith was because she did not sail on the 13th. When I go on board of her, the first thing I am made acquainted with is the crew refusing to get the anchor up, because they do not know where the ship was going, although she cleared in ballast for the Havana, and the crew could not get anybody to satisfy them on the point as to where the ship was going." Captain Hickley then proceeds to state his opinion on various points, such as the right to build vessels adapted as vessels of war without Her Majesty's leave, the right of seamen to refuse going on any voyage which may prove ruinous to them, and he mentions various circumstances which caused him to inspect the "Oreto." He says, "It is impossible for a vessel to fight without guns, arms, or ammunition on board, but the 'Oreto' as she now stands could, in my professional opinion, that is to say, with her crew, guns, arms, and ammunition going out with another vessel alongside of her, be equipped in 24 hours for battle." Captain Hickley makes some statements respecting a man named Jones ; but as this man has gone away and has given no evidence in the case, I think it unnecessary to take further notice of him. Alluding, however, to the information given to him by Jones, Captain Hickley says, "On this public report I seized the vessel again, and Mr. Cardale, the 2d Lieutenant of the 'Greyhound,' was put in charge of her." Captain Hickley's evidence as to the constructions and fittings of the vessel I should consider conclusive, even had there been no other ; but that construction and those fittings were made, not here, but in England, and of whatever nature they may be, do not subject the vessel to forfeiture here. Captain Hickley, it appears, on certain grounds which he states, seized the "Oreto," but acting on the opinion of the Law Officer of the Crown and that of the Governor, he subsequently released her. Between this time and that of her ultimate seizure there is no evidence whatever that she did anything in violation of the Foreign Enlistment Act ; but Captain Hickley's suspicions were aroused by the vessel not sailing for two or three days after that, on which the consignee informed him she would ; he, therefore, again went on board the "Oreto," and found that the reason of her not going was, because the crew had refused to get her

The  
"ORETO."

The  
"ORETO."

under weigh on account of their not being satisfied as to what port she was bound to. I must confess I look upon this as exonerating Captain Duguid and others concerned from suspicion of *mala fides* for not having gone at the time specified by Mr. Harris, but Captain Hickley took a different view of it, and he thereupon seized the vessel again. Now, if he did this, as seems implied in part of his evidence, on account of the crew not being able to obtain satisfactory information as to the destination of the vessel, I can only remark that he did it on ground which is not within the purview of the statute under which she is libelled, but if Captain Hickley thought proper, on a reconsideration of the whole case, to seize her again, he had a right to do so.

Lieutenant Cardale gives nearly the same evidence as Captain Hickley did respecting the construction and fitting of the "Oreto," proving that she is in every way adapted to be used as a vessel of war. He gives his opinion that the vessel could be fitted with her guns in 24 hours, supposing great exertions were made with plenty of hands, and that every thing was sent on board ready fitted for use, that is, the gun carriage slides, train tackles, side tackles, and all the equipments of the guns.

With reference to what Captain Hickley as well as Lieutenant Cardale say respecting the probability of fitting the vessel with guns, ammunition, &c., in a certain time, I have to observe that this evidence may be perfectly correct, but that I have no right whatever to take it into consideration; the case depends upon what has been done since the vessel came within this jurisdiction, and can in no way be affected by what it is possible might be done at some future period.

Mr. Stuart, the master and pilot of H.M.S. "Greyhound," corroborates the evidence of the "Oreto" being built and fitted as a vessel of war.

With respect to acts which were done, or circumstances which occurred on board the "Oreto," before she came within the jurisdiction of the Bahamas Vice-Admiralty Court, it is admitted and is clear that the Court has no authority to adjudicate. The only ground then on which evidence of those facts or circumstances can be admitted at all, is that, it may explain or elucidate acts which have taken place *since* the arrival of the vessel in this port. The stopping of blocks that might be used as gun-tackle blocks or the taking of shells on board of a vessel built as a vessel of war, might afford ground for suspecting that such vessel was intended to be used as a vessel of war, when the same suspicion would not attach to a vessel not adapted for the purposes of war; and if there were evidence that a vessel was being armed for war purposes, the conversation of the parties so arming her, though occurring out of the jurisdiction of the Court, might be evidence to point out for what purpose she was being armed. I proceed now to the evidence of what took place *after* the arrival of the "Oreto" in the Bahamas.

The chief mate Duggan says, "The vessel arrived at Nassau,

The  
"Oreto."

"and went to Cochrane's anchorage, some tackle blocks were fitted on board of her, some there, and some on the passage out. I do not know to what use they were to be applied; they were spare blocks, and we fitted them in case they might be wanted, I do not know if they are what are called side-tackle or train-tackle blocks; I never saw a gun used in my life; I can't say if they were fitted as gun-tackle blocks are. I directed them to be fitted, no one ordered me to have them fitted, they are such blocks as are usually used as watch-tackle or luff-tackle blocks on board merchant vessels, there was nothing put on board the vessel at Cochrane's anchorage but coal and a spare spar. We came into this harbour from Cochrane's anchorage, no fittings were put on the vessel in this harbour. There were some cases of shells came on board as cargo; we stowed them aft in a room which the boatswain called the shell room; I have seen a similar compartment in merchant vessels; we called it a store room. I have seen the store room filled with cargo in merchant ships; I don't know how many cases of shell came, some two or three hundred; they were put out again the same evening or next day; I don't know the reason for discharging them; I was ordered by the captain to discharge them. The stropping of watch-tackle blocks were in the ordinary avocations of the seamen on board. There were no guns on board the ship that these blocks could be used for." He adds, "I do not know that Captain Duguid or any one else had the intent that the 'Oreto' should cruise or commit hostilities against any state, province, or people, I do not know that Captain Duguid or any one else attempted to equip, furnish, or arm the 'Oreto' with that intent.

William Porter, a seaman of the "Oreto," says: "We went to Cochrane's anchorage. There were blocks strapped for guns. I cannot say how many; they were blocks such as could be used for merchant vessels, but they were not to be used as such."

I will here ask, How does he know this? It is mere opinion, without any specified ground.

"When the 'Oreto' came into Nassau harbour cases of shells were put on board. The next day between breakfast and dinner we were worked hurriedly to get them out; they were all cleared out before night; orders were on two occasions given to get the anchor up; we refused to get the ship under weigh. Next day we all got police summonses. Our sole objection to get the vessel under weigh was that we had been deceived."

And on cross-examination he says: "I had never seen a gun tackle until I saw one on board the 'Greyhound.' I did not know they were gun-tackle blocks on board the 'Oreto.' All I know is from what I heard from one of the seamen."

Mr Porter's evidence must be taken *quantum valeat*.

Peter Hanson, seaman, says: "While we lay at anchor, blocks were stropped, two sheaf blocks. I had orders from the chief mate to get the gun-tackle blocks stropped, and to do them as neat as possible, as they would have to be handed over to some person else, and there might be no fault found with them. There

The  
"ORETO."

" were no guns on board ; the blocks were too small for luff-tackle blocks ; they can be used on board a merchant vessel ; they are used for several purposes, but not such a quantity ; there were more than were necessary for the usual use of the vessel. We came into the harbour, some shell was put on board ; it was stowed underneath the cabin. Some was put on board in the evening and some next morning ; we had just finished before dinner when we were told to discharge them again. We set to work to get them out, worked very hard, and the shell were discharged that day. We were ordered two mornings to take up the anchor ; we disobeyed both times. We did not mutiny, we only wanted to be sure of British protection ; we were in consequence summoned to go before the magistrate.

Hanson, it will be observed, states that he had orders from the chief mate to get the "gun-tackle blocks" stropped, but whether he means that the mate made use of that term, or whether he merely uses it himself to designate the blocks he is speaking of, does not clearly appear. He says they could be used for several purposes on board a merchant vessel, but not such a quantity. He grounds his belief then, that they were to be used as gun-tackle blocks, on his opinion that there were more of them than were required for the ordinary use of the vessel.

Walter Irving, a fireman, says : " I saw the men fitting blocks all the spare time they had ; they were called gun-tackle blocks by the crew of the ship ; as far as I can say, they were twenty or more. She remained at Cochrane's anchorage six or seven weeks, and then came into this harbour. I saw shell come on board of her and go out again."

Thomas Robinson, fireman, says : " We arrived at Nassau, went to Cochrane's anchorage, a passenger called Mr. Lowe came out with us ; I saw him go ashore in a boat the first day we arrived ; he came on board while we were at Cochrane's anchorage two or three times. The only orders I ever heard him give on board the 'Oreto' was to some divers that were putting on some copper. I have seen the sailors working at blocks while at Cochrane's anchorage ; they were putting strops on them ; I heard them call them gun-tackle blocks. When the 'Oreto' came into Nassau harbour some cases came on board which were called shell. I saw them coming out of the vessel again next day."

John Quinn, fireman, states : " There was a passenger on board the vessel named Lowe ; I saw him and another person looking at the galley the day they were fixing on the piece of copper at Cochrane's anchorage. A gentleman said to Mr. Lowe, that it was a very dangerous place to have the galley in. Mr. Lowe said that he would get it altered. Two or three days after, the galley was shifted on the upper deck." Captain Duguid, it will be seen in his evidence, denies that Mr. Lowe had anything to do with the moving of the galley ; he explains his reasons for moving it, and states that it could not have remained where it had been moved to, when the vessel was under weigh. "Mr. Lowe frequently came on board the vessel at Cochrane's anchorage.

The  
"ORETO."

"I saw the men, while at Cochrane's anchorage, working at blocks, stropping and painting them. I did not know what they were for; they were called by the men gun-tackle blocks. The ship quitted Cochrane's anchorage and came into this port. There were some little square boxes, which they said were shot or shell, taken on board after she came in. I think they were taken out next day."

Neither this nor the two preceding witnesses knew that the blocks they were speaking about were gun-tackle blocks, but they heard them called so by some of the crew.

Charles Ward, formerly steward of the "Oreto," says: "Mr. Lowe went in the ship to the anchorage; he left her there, but came on board several times while we were there. He provisioned the ship." Mr. Harris swears, it will be seen, that Mr. Lowe had nothing to do with provisioning the ship; "that he (Mr. Harris) gave orders to Turtle and Miller to send provisions on board. He asked me one day if I would like to join the ship after he got the other crew on board. On one occasion the captain and chief engineer and Mr. Lowe came on board and had tea, and they had some words. Mr. Lowe told the captain and chief engineer that he wanted to provision the crew in a different manner. He said if they would even eat three or four or five pounds of meat a day he would send it to satisfy them; and Mr. Lowe told the chief engineer he was no more than a boy in the ship, and had nothing to do with the matter, and he was qualified to do his own duty. The chief engineer said that if Mr. Lowe wished, he would leave the ship and go home when Captain Duguid did, and break the contract. Mr. Lowe then went on deck. I afterwards heard the captain say, it was nothing out of his pocket, he did not care how the ship was provisioned, as he knew she belonged to the Southerners, and he did not care for Northerners or Southerners as long as he got his pay out of the ship. This was while she was at Cochrane's anchorage."

In his cross-examination, he says: "I quitted the ship at Cochrane's anchorage. The captain put me in prison, where I remained 14 days. The magistrate put me in for refusing to do seaman's duty, which I did not sign for. I know a Mr. Jones, we were both in gaol together. He came out the day before me. He and I went to live at the Clifton Hotel. I had no money when I quitted the 'Oreto.' On the morning I came out Jones said he would pay my way. I heard the captain, the chief engineer, and Mr. Lowe say, the ship was for the Southerners. I know from what I heard Mr. Lowe say, that he provisioned the ship. I heard the captain, the chief engineer, and Mr. Lowe say; that she was intended for the Southerners. I also heard them say, that if she had her guns on board she could compete with anything the Northerners had."

I here repeat the observation I before made, that this evidence ought to be received with great caution. What the witness

The  
"ORETO."

gives in evidence is, the inference he draws from certain conversations which he states he overheard. Now, if we had the very words which were spoken, we might not draw that inference. Knowing the powerful vessels which the Federal States possess, I can hardly believe that a nautical man would utter such an absurdity as that a small vessel like the "Oreto" could compete with anything the Northerners had ; and I think it very improbable that Mr. Lowe would tell the chief engineer that he was no more than a boy on board the ship. Now, from several improbabilities which Charles Ward's evidence contains, from its being positively contradicted by respectable witnesses in some parts, and from the unsatisfactory manner in which the man appeared to me to give his testimony, I attached but little weight to it.

Daniel Harvey, coal trimmer : " Mr. Lowe gave me orders to " make travellers for boats' masts and stanchions for the dingey " and gig boat. He said they would do very well. Mr. Allan, the " chief engineer, gave me a paper with the pattern on it, and " said that Mr. Lowe said he would rather have them made of " iron than wood. Mr. Lowe asked me if I would like to remain " by the vessel for a commission ; he did not say how long ; it " might be for two or three years ; as greaser and blacksmith. " This conversation took place two or three days before he left " Nassau."

Thomas Joseph Waters gives the following evidence : " I met " a gentleman named Lowe once or twice. I heard he had come " out in the ' Oreto.' I left this place some time ago in a vessel " called the ' Nassau.' Mr. Lowe was a passenger with me in " that vessel. We were bound, I believe, to a Confederate port. I " wished to go to Charleston. I do not know where this vessel " was bound to. We were captured off Wilmington by a Federal " war steamer, called the ' Georgia,' and a gun-boat, called the " ' Victoria.' After the capture of the vessel she was carried to " Fort Monroe, and afterwards to New York. Mr. Lowe was " carried with the vessel. He was brought before the Prize " Court at New York, examined, and set at liberty."

This evidence is merely to show that Mr. Lowe was connected with the Confederate States of America. It appears, however, that the Prize Court at New York saw no ground for detaining him.

Mr. Stuart, the master and pilot of the " Greyhound," says : " I also saw many double blocks fitted. Eight might be in use " for ship's purposes for luff-tackle blocks, but the residue *might* " be used for side-strain tackle, that is, for working at guns. I " should say, there were more than double or treble the number " required for the ordinary use of the vessel."

He then states having seen some of the boxes of shells which were put on board in this harbour.

It appears that the men belonging to the " Oreto " who have given evidence on the part of the prosecution had had a quarrel

with the captain, and that they had been before the magistrate. This must be taken in consideration in weighing their evidence.

The  
"ORETO."

Hon. G. D. Harris: "I am a member of the firm of Henry Adderley and Co., of this town, merchants. We do foreign commission business. I know the British steamship 'Oreto,' she arrived in this port consigned to our care. I made application to the Receiver General on behalf of the firm to know if there was any objection to our shipping arms and other merchandise by that steamer, and requested that he would communicate with the Governor in order that there might not be any possible misunderstanding. The Receiver General informed our firm a day or two afterwards that he had communicated with the Governor, and that there was no reason why we should not ship a cargo of arms or any other merchandise by that vessel, and that he was fully authorized to grant his permission, which he then immediately did. We then made the usual entries, and applied for a civil officer of customs. Before, however, any cargo was transhipped, we received a letter from the Colonial Secretary, informing us, that as the build of that vessel had excited some suspicion, the Governor directed that, if practicable, she should come into the harbour, and take in her cargo under the immediate eyes of the authorities, or words to that effect. She was accordingly brought into the harbour, and certain cargo was taken on board, I believe under the supervision of an officer of the customs. Some of the cargo consisted of shell. They were certainly not live shell. This cargo that we were putting on board was what we had received special permission to put on board from the Receiver General. It was put on board under our direct orders as consignees of the vessel."

"The consignees, it appears, changed their minds about the destination of the vessel, and ordered the shell to be taken out, intending that the vessel should go immediately in ballast to Havana. When the cargo was nearly discharged, Mr. Harris met Captain Hickley on board the "Oreto." On that occasion he says, "I informed Captain Hickley that we had given orders for the discharge of the 'Oreto's' cargo, it being our intention to despatch her in ballast to Havana, and that the Custom House officer then present was prepared to hand me the clearance after ascertaining that the cargo was entirely discharged. The landing waiter and searcher were present and heard what I said. Captain Hickley then informed me that he considered he had nothing further to do with it. I came on shore with Captain Hickley after he had ordered his men into their boats. I think the Custom House officer had the clearance in his possession, and I do not know whether he showed it to Captain Hickley. It was afterwards given to us. (The clearance was produced.) In accordance with a promise I had given Captain Hickley, I sent a message on board the 'Greyhound' to inform him that the vessel was ready for sea,

The  
"ORETO."

" and to ask if he would like to visit her or send officers to inspect her. He wrote to me that he would do so immediately. I know Captain Hickley went on board, but I was not present. We had some difficulty with the crew. They set up a plea that the vessel not having touched at Palermo there had been a deviation of the voyage, and therefore they claimed their discharge. We demurred to this, but afterwards agreed to pay them their wages up to date and give them a bonus of 5*l.* and pay their passage to England if they would not remain in the ship. This they refused to accept; stating that from the several visits of the man-of-war on board the vessel they considered she was of a suspicious character, and that they would not go in her unless the Governor and Captain Hickley guaranteed their safety. Some accepted the terms that were offered. In consequence of this they were summoned before the police magistrate, and the case was brought under his adjudication. They elected to take their discharge. I was present at the time; they then and there agreed to quit the ship. They then obtained leave to go on board for their clothes. The men were discharged by the magistrate. In consequence of this we got a shipping master to ship another crew for the 'Oreto.' I think there were 15 or 16 new hands then shipped. They received the usual advance. It was our intention to send her immediately to sea. I had arranged with the pilot to take her out the following morning (Sunday); they, however, missed the tide, the crew not having come on board. The vessel was again seized that day. The crew we shipped then left the 'Oreto.' I have not seen them since, and all the advance we paid is lost. We had the sole direction and management of the 'Oreto.' I know of no person but Captain Duguid having any control over the 'Oreto.' I have seen a person named John Lowe, who came out passenger in the 'Oreto.' Mr. Lowe while at Nassau never exercised any authority over the 'Oreto.' We never received any instructions from him relative to the 'Oreto.' The day the vessel arrived we received a message from the captain, requesting us to send meat and other provisions on board. I gave orders to Turtle and Miller to supply the vessel with meat. In placing the cargo on board the 'Oreto' it was distinctly understood as cargo. I stated to the Receiver General that it was cargo only; that we intended to ship a full load by that vessel. We were fully aware that we could not ship such goods otherwise than as cargo, unless committing a breach of the Foreign Enlistment Act; and had we been ordered to do so, we should have handed the consignment over to some one else. No act was done by authority of Henry Adderley and Co. with the intent that that vessel should be employed as a cruiser. I told Captain Duguid, very shortly after he arrived here, that they were talking a good deal about the build of his vessel, and I said, "Mind, do nothing that will have the appearance of equipping."



The  
"ORETO."

On the cross-examination, he says: "The vessel was consigned to us by Messrs. Fraser, Trenholm, and Co., of Liverpool. She was consigned as a merchant vessel, and we considered her as such. No instruction in the first instance was given to us, except the general instructions of shipping cargoes by all their vessels to Messrs. W. and R. Wright, St. John's, New Brunswick, on account and risk of J. R. Armstrong, of Liverpool. Mr. John Lowe, I think, brought a letter of introduction from Mr. Trenholm to the firm. I do not know whether Mr. Lowe was in any way interested in the 'Oreto.' I do not recollect Mr. Lowe being mentioned in any correspondence which we received from Fraser, Trenholm, and Co. We never had any transactions with Mr. Lowe in regard to the 'Oreto.' She remained here several weeks before any attempt was made to ship cargo in her. We thought we should receive some instructions from our friends about her, but we did not. The shipping of the cargo on board the 'Oreto' was performed by us under our general instructions. I am not prepared to say whether the vessel was actually going to St. John's, New Brunswick. There ought to have been a searcher of the Customs on board at the time of the loading and unloading. I am not aware that there was. In this case I particularly requested that one might be put on board."

It will be seen that Mr. Harris distinctly negatives the idea that Mr. Lowe had any control over the "Oreto," while in Nassau, or that the consignees had any transactions with him in regard to her.

Frederick T. Parke says: "I am a master mariner; I have commanded steamships, and now command the 'Minho.' I have seen the 'Oreto.' I have not been on board of her. I know her size. I think four or five dozen spare watch and luff tackle blocks sufficient for a vessel of the 'Oreto's' size. A new vessel in fitting out generally takes more extra blocks than a vessel that has been a voyage."

On cross-examination, he says: "Luff tackle are used for cargo, for taking in boats, and for other heavy purposes. Watch-tackle blocks are used in a variety of ways; blocks are called luff-tackle, watch-tackle or gun-tackle blocks, according to the purposes to which they are to be applied. They can be applied in various ways."

William Raisbeck says: "I am a master mariner, I have never before commanded a steamship. I command the 'Leopard.' I have seen the 'Oreto.' A vessel of her class ought to have 30 or 40 blocks, including the luff and watch tackle blocks, not less. I consider that would be a reasonable supply for a vessel of that kind."

Thomas Joseph Waters says: "I have been a master mariner for five years. I have always commanded steamships. I have seen the ship 'Oreto.' She is a first-class ship, and they would never send a vessel of that class from London with less than four or five dozen blocks."

The  
"ORETO."

Richard Eustice says: "I am a master mariner. I commanded the steamship 'Scotia.' I have commanded steamships for six years. I know the 'Oreto' by seeing her. I am thoroughly acquainted with what is necessary for the fitting of a steamship. I think at least 50 or 60 spare blocks would be a fair quantity for a new vessel like the 'Oreto.' I mean watch-tackle and luff-tackle blocks. A steamer that is sailed must necessarily have more blocks than one that is entirely propelled by steam. I could muster up 30 or 40 luff-tackle and watch-tackle blocks on board of the 'Scotia.' The 'Scotia' is not more than half the size of the 'Oreto.' The 'Oreto' is rigged as a sailing ship."

Captain Parke then thinks the "Oreto" should have four or five dozen spare watch and luff tackle blocks; Captain Raisbeck thinks she should have 30 or 40 blocks including luff and watch tackle blocks; Captain Waters thinks she should not have less than four or five dozen blocks; and Captain Eustice thinks she should have at least 50 or 60 spare blocks.

The evidence we have of the number of blocks on board the Oreto, is that of Walter Irving, a fireman, who says, "as far as I can say, there were twenty or more," and that of Mr. Stuart, the master of the "Greyhound," who says, there were more than 24 tackle.

James Alexander Duguid:—"I am master of the Oreto. On the day of our sailing (that is, from Liverpool) there were a few friends of the owners dining on board the vessel. There where no toasts on that occasion drunk, the only one that was drunk, that I am aware of, was the one I proposed myself, which was, 'Success to the Vessel and her Owners!' I never heard any one propose a toast on board the 'Oreto,' 'Success to the Oreto, may she be triumphant over her enemies!' I am certain such a toast was never proposed. I heard a man named Ward give his evidence, in which he swore to that toast having been given. The owner of the 'Oreto,' I believe, is named Mr. Thomas. I took my instructions from Fossel, Preston, and Co. the agents. I was lying in the Mersey from the 4th to the end of March. During that time the crew were employed doing the ordinary work of the ship. I gave orders with regard to the blocks on board the vessel. It is usual in the merchant service for the chief officer, when he cannot find employment for the men himself, to ask the master what he wishes to have done. I told him, rather than let the men be idle, to let them fit all the spare blocks, which he did. This was while we were lying in the Mersey. I never gave any orders to fit blocks as gun-tackle blocks. I never ordered blocks to be fitted, intended to be used as gun-tackle blocks. I quitted the Mersey about the end of March, the destination of the vessel having been changed twice in the meantime; and when I quitted the Mersey I was bound to Nassau. A Mr. Lowe came out with me to Nassau; he came out as a passenger. He never to my

The  
"ORETO."

" knowledge exercised any authority over the 'Oreto'; I only recognized him on board the vessel as a passenger.

" There was not, to my knowledge, a Confederate flag on board the 'Oreto'; she is a new vessel. With the ordinary stores of the vessel a parcel of flags came on board of her; they were all tied up in thick brown paper, and all labelled outside. Previous to my quitting Liverpool I overhauled the parcel of flags, and in so doing I saw a parcel marked 'Confederate,' which I sent on shore without opening. My object in doing so was, as the vessel was bound to Nassau, if we fell in with an American cruiser, they might think themselves justified in seizing or detaining the vessel. I swear that there was no Confederate flag on board the 'Oreto' when she passed Point Lynaa, where the pilot landed. I have heard Ward and another of the men examined swear that there was a Confederate flag on board the vessel, which was false.

" I remember speaking a vessel on the voyage out. I did not on that occasion say, 'If we had our bull-dogs on board I would make you answer quick enough.' I never thought of such a thing. I heard Ward say that I had made use of that expression, which he has sworn falsely to.

" I arrived here at the latter end of April; I went to Cochrane's anchorage, and I communicated with H. Adderley and Co., as the agents of the vessel representing my owners in England. I had no instructions when leaving England who the agents of the vessel were, but on my arrival here I understood they were. Mr. Lowe had a letter, and told me that Messrs. H. A. and Co. were the agents of the vessel, and they would enter the ship. I remained at Cochrane's anchorage seven weeks; we were waiting orders from the agents, who were waiting orders from the owners at home.

" During the time the 'Oreto' lay at Cochrane's anchorage, I do not believe that I gave any orders to my men to strop blocks. I saw on two or three occasions men stropping blocks, and I never had a thought that those blocks should be used on board the 'Oreto' as gun-tackle blocks, for the purpose of arming her to cruise against any foreign state. I never heard them called gun-tackle blocks. It is about six weeks since the 'Oreto' came into the harbour of Nassau. I brought her in by the direction of H. Adderley and Co. Cargo came on board with a boat note requesting me take on board shell as cargo. I took in upwards of 400 boxes. On the second day I received orders to discharge the shell, as the destination of the vessel had been changed, and if we could get them landed in time that day, the vessel would be cleared for the Havana. We discharged them with all possible haste to get them landed in custom-house hours. During the time we were receiving and discharging cargo, I saw a custom-house officer on board, I think by the name of Webb; I saw him on board two or three times, but he might have been oftener on board, as I was on shore two or three times.

The  
"ORETO."

" While we were discharging shell we were boarded by Captain Hickley and the officers and men from the 'Greyhound.' Captain Hickley stopped the further discharge of the cargo.

" While Captain Hickley was on board Mr. Harris came. I heard Mr. Harris tell Captain Hickley that the vessel was cleared for Havana. After this Captain Hickley quitted, and told me, as she was cleared for Havana, I could sail when I pleased.

" The shell was taken on board by the direction of the agents. I never thought it was intended for the vessel, neither did I know that it was.

" I was boarded again by the same officers and men from the 'Greyhound,' four or five days after the first occasion. The vessel was then searched. Previous to her sailing, the officers and men of the 'Greyhound' searched her.

" We had some men engaged on Saturday to proceed to sea on Sunday morning, but owing to their not coming on board in time, we could not get the vessel unmoored in time for the tide. She was on that day seized by the officers of the 'Greyhound.' Two mornings following, previous to this seizure, I mean on Friday and Saturday, I ordered my crew to get the vessel under weigh; but they refused, stating that I had deceived them once, and that they would not believe what I told them again. I told them she was cleared for Havana, and bound there, as far as I knew. They still continued to refuse to work, and said that they would not believe anything about what I told them. In consequence of this I sent warrants on board for them. They all appeared before the magistrate. They said that they would not proceed in the vessel unless they were guaranteed that they would be safe from any American cruisers. They then said that they would take their discharge, and the whole of them took their discharge." (It appears they afterwards went on board, got their clothes, and left the vessel.)

Captain Duguid goes on to say: "I know a man named Ward, he is my steward; he was sent to prison for a fortnight at my instance. I think the day he came out of prison he made use of very abusive language and threats to me down on the wharf, stating that he would fix me before he had done with me, and the vessel too. I know a man named Jones, he shipped on board the 'Oreto' as boatswain. He was disrated when about half of our passage out for incompetency. He quitted the ship at Cochrane's anchorage, taking the boat with him. I do not know if he is in the country. I have not seen him. I have heard that he is gone away. I am very sorry that Jones has gone away, I would rather have him here. On the oath I have taken I have not myself been privy to Mr. Jones' leaving this place, or to making him any recompence of any sort for leaving it, nor do I know of any person connected with the 'Oreto' having done so. During the time the 'Oreto' lay in the Mersey, she was passed and repassed by men-of-war. At one time men-of-war were lying within a mile of her. Officers of

The  
"ORETO."

" the Navy were passing her every hour in the day. The fittings  
" of the 'Oreto,' from the time of her quitting Liverpool, up to  
" the present time, are the same, with the exception of the little  
" alteration in the boats' davits. Four of them were lengthened  
" two feet. That is the only alteration since she left Liverpool.  
" I have not, since the 'Oreto' has been in harbour, attempted  
" to fit her out in any shape that she might cruise or commit any  
" hostilities against any foreign state. The shipping of the  
" blocks at Cochrane's anchorage was done under the order  
" that I gave when at Liverpool. As I do not remember  
" having given any order than that to ship blocks, I had no  
" intent, nor would I do so, to use the 'Oreto' to commit hos-  
" tilities against any power or state. Mr. Lowe never gave me  
" any orders to stop blocks, or any other orders connected with  
" the vessel. Mr. Lowe took sights at sea, asking me to allow  
" him to do so, as he wanted practice, but he never navigated  
" the vessel, changed her course, or gave any orders to the crew  
" with my knowledge. I was present when Ward was ex-  
" amined, when he said some conversation took place between  
" Mr. Lowe and myself relative to the vessel being for the South.  
" No such conversation took place at Cochrane's anchorage, or  
" at any other time. Mr. Lowe had nothing to do with the  
" removal of the galley. I had it done for the convenience of  
" the men, as it was too hot for them where it was below."

On cross-examination he says: "I received my instructions from  
" Messrs. Fosset, Preston, and Co., as to the voyage. They were  
" written. (The instructions were produced.) In the conversation  
" referred to in the letter, dated 22d March 1862, I proposed  
" going to Nassau instead of Havana. No instructions were  
" given to me as to the ultimate destination of the vessel after  
" she reached Nassau." (Captain Duguid then gives some  
evidence as to the fittings of the vessel, but as it does not affect  
the evidence already given on that point, there is no necessity to  
repeat it.)

"I saw the men employed at Cochrane's anchorage stropping  
" blocks; I never at Cochrane's anchorage heard those blocks  
" called 'gun-tackle blocks.' The first time that I heard the  
" term 'gun-tackle blocks' used was in this Court. I have not,  
" that I am aware of, any blocks on board the 'Oreto' called  
" gun-tackle blocks. I saw in the log book of the ship that  
" they had been called gun-tackle blocks; I saw that entry  
" since the vessel arrived here. I am not aware whether the  
" entry was made after the vessel arrived here. On the 16th of  
" May there is an entry in the log book, 'Hands employed  
" 'in scraping the mainmast and stropping the gun-tackle  
" 'blocks.' There is a word struck out in the entry in the log  
" book of the 9th of June; I am not aware of my having struck  
" it out. I had no knowledge whatever, when the vessel cleared  
" for Havana, that she was ultimately bound to the Confe-  
" derated States of America. I have no knowledge whether  
" the vessel was to return to Europe or not. I have no know-

The "Oreto." "ledge one way or the other. I have no knowledge whatever that she had been sold, or agreed to be sold to any persons in the Confederate States. I struck out some parts of the log book, but I will not undertake to swear that I struck out the word in the entry of the 9th of June, referred to as follows,—  
 " 'Received on board 440 cases of shell and stowed them in the room.' After 'the' there is a word scratched out, between the word 'the' and 'room.' I have never stated that the vessel was intended for a vessel of war.

"The galley was moved; the caboose was in the galley; it was in its proper place. That galley was in the mess deck. It will have to be placed there again before the vessel can go to sea, as it was only shifted for the convenience of the men. When I was preparing to go to sea on the 15th of June, I had not attempted to remove the galley. There was not time; we could have done it after the anchor was up. Where it was originally placed, it was not near the magazine; it was removed as far as possible from it. If the magazine was filled with powder, I think it would be quite safe if the galley were in its proper place.

"The ship while at Cochrane's anchorage was frequently visited by Mr. Lowe. I don't know when Mr. Lowe left this. I think he left in a vessel called the 'Gordon' or 'Nassau.' I have not seen him since."

The question now to be decided is, whether upon a careful consideration of the evidence there appears proof, or circumstantial evidence amounting to reasonable proof, that a violation of the provisions of the Foreign Enlistment Act has been committed by the parties having charge of the "Oreto," 1st, by attempting, by any act done since she came into this colony, to fit or equip the "Oreto" as a vessel of war; 2dly, by making such attempt for the purpose of fitting and equipping her as a vessel of war for the service of the Confederate States of America, to cruize and commit hostilities against the citizens of the United States of America. I have already said that what took place *before* the vessel came here can only be received as elucidatory or explanatory of what occurred *since* that time. Two facts have been proved, both of which, it has been contended, are violations of the Act. One is, that while the vessel lay at Cochrane's anchorage some blocks were stropped in such a manner that they might be used as gun-tackle blocks, and that they were so called in an entry in the ship's log book, and by some of the crew. The other, that a number of boxes containing shells were put in the ship after she came into this harbour, and were taken out again.

I first notice the evidence relating to the shells.

A permission from the Governor in Council to ship cargo in the "Oreto" has been given in evidence; this does not prohibit any kind of cargo; shells might, therefore, be shipped under it as well as any other kind of cargo. It appears, by the evidence of Mr. Harris, one of the consignees of the vessel, that everything

relating to the shipment of the shells was done openly and *bond fide*. It was observed by the Advocate General that penal statutes need not now be construed so strictly as they formerly were. Supposing that to be the case, there is no doubt that it is necessary to act on them with great caution. Now, what is the proof that these shells were intended for the arming of the vessel? Why is it not as probable that they were intended to be carried as many similar cargoes have been, and landed at some other port? Mr. Harris, who shipped them, swears they were intended as cargo. Captain Duguid does the same, and so does Mr. Duggan, the chief mate. What proof is there, either direct or circumstantial, that these gentlemen have sworn to what is false? It will be remembered that these shells were taken out of the "Oreto," and landed *before* the vessel was seized. The original intention, therefore, with regard to the shells, whatever it may have been, had been abandoned before the seizure was made. Is, then, the mere probability that such original intention was to arm and equip the vessel for war purposes sufficient for imputing the crime of perjury to Mr. Harris, to Captain Duguid, and to Mr. Duggan, and for the condemnation of the vessel for a violation of the Foreign Enlistment Act? I certainly think not.

The  
"ORETO."

The stropping of the blocks now alone remains to be considered.

While the vessel lay at Cochrane's anchorage strops were put on some blocks, which had been brought in her from England. The blocks so stropped might be used as gun-tackle blocks, but blocks so stropped may also be used for the ordinary purposes of a merchant ship. What proof is there, then, that they were to be used as gun tackle? 1st, It is contended, because they were named gun-tackle blocks in an entry in the ship's log book, and were so called by some of the crew; 2dly, because there were more of them than could be required for the ordinary use of the ship as luff tackle, or watch tackle, and then, it is argued, if the blocks were intended as gun-tackle blocks, the "Oreto" having been constructed as a war vessel, it is to be inferred that they were intended for her equipment.

The other side, in reply, contend, 1st, that as the tackle might be used for either of the purposes before mentioned, the mere circumstance of the mate, in his entry in the log book, or some of the crew, not knowing for what they were really intended, choosing to call them gun-tackle blocks, is no proof whatever that the owners of the vessel intended to use them as such; 2dly, that the evidence of Captains Parke, Raisbeck, Waters, and Eustice, all master mariners, and men of much experience has proved that the number of blocks on board the "Oreto" is not at all greater than would be required for the ordinary purposes of the ship, especially as she is a new vessel, on board of which a greater number of spare blocks is usually provided than is to be found in vessels that have been in use. That Captain Duguid unequivocally states, in his evidence, that the blocks were solely for the ordinary use of the vessel, and were never

The  
"Oreto."

intended to be used as gun-tackle blocks. That he never ordered them to be stropped as such, or heard them called so until he heard the evidence given in this Court.

Comparing, then, the evidence on the one side with that on the other, I agree in the opinion that the mere fact of blocks which might be used for other purposes being *called* gun-tackle blocks by persons who did not know for what purpose they were intended, is not proof that they were intended to be used as gun-tackle blocks. I think that as the fact of there being more blocks on board the "Oreto" than were required for her use, is a matter of professional opinion; and as the opinion of several master mariners quite competent to form a correct one has been given in evidence, that there were *not* more blocks on board the vessel than might have been required for ordinary use, I ought not, in the absence of any valid and produceable reason for so doing, to adopt the opinion of one party in preference to that of the other. The consequence of which is, that the fact of there being more blocks than could be required for the ordinary use of the vessel is not sufficiently proved.

Lastly, I see no evidence to invalidate the direct and positive testimony of Captain Duguid, that the blocks were *not* intended to be used as gun-tackle blocks.

If there is not enough proof that the blocks in question were intended to be used as gun-tackle blocks, any observation as to the probability arising from the construction of the ship that they were for her equipment becomes unnecessary.

If the evidence given to prove that any act has been done here subjecting the vessel to the penalties of the Foreign Enlistment Act is not sufficient for that purpose, it is, perhaps, superfluous to say anything about the capacity of the vessel to take cargo, or her connexion with the Southern States of America. I will, however observe, that although the ship may not be calculated to carry the ordinary bulky cargo of merchant ships, yet there are certain kinds of cargo of which she might carry a considerable quantity. For example, there were some hundreds of boxes of shells put on board of her, and these were stowed in a compartment called the shell room. There yet remained what is called the magazine, the light rooms, and other places, besides the cabin. Into these a very large number of muskets, sabres, pistols, and other warlike instruments and ammunition might be stowed. And it is not improbable that a fast vessel of this description might be used for what is called "running the blockade," an employment which, however improper in itself, would not subject the vessel to forfeiture here.

I think, too, that the evidence connecting the "Oreto" with the Confederate States of America, as a vessel to be used in their service to cruize against the United States of America, is but slight. It rests entirely on her connexion with a gentleman named Lowe, who came out passenger in her, and some evidence has been given, from which it may be *inferred* that this Mr. Lowe is connected in some way with the Southern States. He is said



by some of the crew to have exercised some control over the "Oreto." This is denied, on oath, by Mr. Harris and Captain Duguid. But, assuming it to be true, and assuming also that Mr. Lowe is connected with the Confederate States, no one can state that Mr. Lowe, or his employers, if he have any, may not have engaged the "Oreto" for the purpose of carrying munitions of war, which we have seen she is capable of doing, and this would not have been an infringement of the Act under which she is libelled. But the evidence connecting the "Oreto" with the Confederate States rests almost entirely on the evidence of the steward Ward, whose testimony I have already explained my reasons for receiving with much doubt.

Under all the circumstances of the case, I do not feel that I should be justified in condemning the "Oreto." She will therefore be restored.

With respect to costs, although I am of opinion that there is not sufficient evidence of illegal conduct to condemn the vessel, yet, I think all the circumstances of the case taken together were sufficient to justify strong suspicion that an attempt was being made to infringe that neutrality so wisely determined upon by Her Majesty's Government. It is the duty of the officers of Her Majesty's Navy to prevent, as far as may be in their power, any such infringement of the neutrality. I think that Captain Hickley had *prima facie* grounds for seizing the "Oreto," and I therefore decree that each party pay his own costs.

The  
"ORETO."

# General Division of Matter.

Motion for Rule for New Trial Page 1 -

Argument of Sir Hugh Cairns 68-220

" " Mr Karlake 220-253

" " Mellish 253-267

" " 9d 273-277

" Kemplay 267-273

Atty Gen Palmer 277-413

Sol & Gen Golliver 413-71

Queen's Advocate Phillimore 472-94

Mr Locke 494-512

Opinion of Jones 512-24

" Lord C Baron 525-40

" B. Bramwell 540-50

" " Channell 550-63

" " Pigott 563-71

Printed by GEORGE E. EYRE and WILLIAM SPOTTISWOODE,  
Printers to the Queen's most Excellent Majesty,  
at Her Majesty's Stationery Office.

Regulations on Belligerents Appx

Trial of the Oreta on Florida IV - 27

## Alphabetical Index.

Alabama the — her outfit, a vio-

lation of law & her escape/punishment

according to the Court — 152-7:281

Why were not her builders &c.

included? — Journal of Hugh Cairns 156-

— international of force by, cannot

be divided among piecemeal — 312

— build & designed for a, ab initio,

to be carried by Atty Gen — 355

— international damages by, guarded

against by contract of Atty Gen — 286

Arms, the furnishing of distinguished from one

